SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 11

UNITED STATES GYPSUM COMPANY, APPELLANT,

vs.

NATIONAL GYPSUM COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

VOL. I

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 18, 1956

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[fol. 1]

IN UNITED STATES DISTRICT COURT

MANDATE OF THE SUPREME COURT OF THE UNITED STATES FILED IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA—April 10, 1948

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the District of Columbia

[Seal of the Supreme Court of the United States]

Greeting:

Whereas, lately in the District Court of the United States for the District of Columbia, before you, or some of you, in a cause between The United States of America, Plaintiff, and United States Gypsum Company et al., Defendants, Civil Action No. 8017, wherein the final decree of the said District Court, entered in said cause on the 5th day of August, A. D. 1946, is in the following words, viz:

"This cause having come on for trial, and the plaintiff having completed its presentation of evidence, and the Court having made and filed its Findings of Fact and Conclusions of Law,

It is hereby adjudged and decreed that the complaint as amended herein be, and the same hereby is, dismissed on the merits.

Harold M. Stephens, Finis J. Garrett, Joseph R. Jackson."

[fol. 2] as by the inspection of the transcript of the record of the said District Court, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

[fol. 3] And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and forty-seven, the said cause came on to be heard before the said

Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court, in this cause be, and the same is hereby, reversed.

And it is further ordered that this cause be, and the same is hereby, remanded to the said District Court for further proceedings in conformity with the opinion of this Court.

March 8, 1948.

[fol. 4] You, therefore are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, the ninth day of April, in the year of our Lord one thousand nine hundred and forty-eight.

(Signature Illegible), Clerk of the Supreme Court of the United States.

[fol. 5] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, Plaintiff,

v.

UNITED STATES GYPSUM COMPANY, ET AL., Defendants

ORDER ON MANDATE—Filed June 8, 1948

United States of America having appealed to the Supreme Court of the United States from the judgment entered in this cause on the fifth day of August, 1946, and the said court having issued its mandate dated the ninth day of April, 1948, wherein it was ordered, adjudged and decreed that said judgment be reversed and the cause re-

manded to the District Court for further proceedings in conformity with the opinion of the Supreme Court of the United States;

Now upon the mandate of the Supreme Court of the United States, dated the ninth day of April, 1948,

It is ordered, adjudged and decreed that the judgment of this court entered the fifth day of August, 1946, be and the same is hereby vacated and set aside; and that the cause be restored to the docket for further proceedings in accordance with such mandate.

Dated June 8, 1948 .

Harold M. Stephens, Finis J. Garrett, Joseph R. Jackson.

A true copy. Test: Harry M. Hull, Clerk, by H. N. Graves, Deputy Clerk. (Seal.)

[fol. 6] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Holding a Three Judge Court

Civil Action No. 8017

UNITED STATES OF AMERICA, Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC., NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, doing business under the name of TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; HENRY J. HARTLEY; FREDERICK G. EBSARY; and FREDERICK TOMKINS, Defendants

Reporter's Transcript of Proceedings of Conference of June 8, 1948

Court Room, U. S. Court of Appeals Building, Washington, D. C., Tuesday, June 8, 1948.

The above-entitled cause came on for discussion with respect to further proceedings at 10:00 o'clock a. m., pur-

suant to notice, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

[fol. 7] APPEARANCES:

On behalf of the plaintiff:

Roscoe T. Steffen, Esq., and Edward Knuff, Esq., Special Assistants to the Attorney General.

On behalf of the defendants:

Bruce Bromley, Esq., Hugh Lynch, Jr., and Murray W. McEniry, Esq., for the defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode.

Elmer E. Finck, Esq., for the defendants National Gypsum Company and Melvin H. Baker.

Charlton Ogburn, Esq., for the defendant Certain-Teed Products Corporation.

Andrew J. Dallstream, Esq., Norman Waite, Esq., and Ralph P. Wanlass, Esq., for the defendants The Celotex Corporation.

Joseph S. Rippey, Esq., for the defendants Ebsary Gypsum Company, Inc., and Frederick G. Ebsary.

James O'Donnell, Jr., Esq., for the defendants Newark Plaster Company and Frederick Tomkins.

Scott P. Crampton, Esq., for the defendant Samuel M. Gloyd, doing business under the trade name of Texas Cement Plaster Company.

[fol. 8] PROCEEDINGS

Chief Justice Stephens: The Court has received the mandate of the Supreme Court in this case and also the letter of the Government requesting a conference of all counsel.

That letter suggested that the Government wished to propose a plan with respect to the further progress of the case.

We will hear from the Government on that subject.

Mr. Rippey: If the Court please, I am appearing for the

first time in this case on behalf of the Ebsary Gypsum Company, Inc., and Frederick G. Ebsary.

I should like to ask the permission of the Court to enter my appearance for the purposes of this case.

Chief Justice Stephens: Will you state your name?

Mr. Rippey: Joseph S. Rippey.

Chief Justice Stephens: Your appearance may be entered.

OPENING STATEMENT ON BEHALF OF THE PLAINTIFF

By Mr. Steffen:

Mr. Steffen: Your Honor, I have submitted to the Court an order on the mandate of the Supreme Court, and I believe it is on your Honor's desk. It vacates the judgment entered on the 5th of August, 1946, and restores the case to the docket for further proceedings. I think it is a formality. Copies have been served on the other side.

Chief Justice Stephens: Do the defendants have any comment on this proposed order?

[fol. 9] Mr. Bromley: May it please the Court, only that I think it is unnecessary.

Mr. Steffen: May I make a statement, further, your Honor?

Chief Justice Stephens: You may.

Mr. Steffen: We consulted Mr. Hull, the Clerk, and he states that that is the usual practice in the District, and we simply attempted to conform with that.

Chief Jusice Stephens: We think it is probably unnecessary in view of the form of the mandate in the Supreme Court. However, it probably will do no harm to sign it, but we will postpone action on it until we hear further from the Government as to its plan with respect to the further progress of the case. It might bear some relation to that, so we will postpone it temporarily.

Mr. Steffen: I can state very briefly what our plan is: With the case reinstated, the matter comes back to the Court for purposes of further proceedings, and in normal course the defendants would go forward with their evidence.

The complexion of the case is somewhat changed since

it was argued before your Honors, and I think that probably your Honor's duties have been somewhat augmented since that time, and our purpose——

Chief Justice Stephens: (Interposing) I am sorry, I didn't quite understand that.

Mr. Steffen: I say I think your Honor's duty as Presiding [fol. 10] Justice here have been somewhat augmented since the time of the argument and that our purpose is to see if some means cannot be worked out whereby we can bring the case to as early a conclusion as possible.

Some of the matters that were gone into on the Government's proof now become more or less immaterial, in view of the Supreme Court's holding.

Contrariwise, some of the evidence that the defendants might have originally intended to put in by way of countervailing that proof becomes unnecessary; and, therefore, what we are suggesting as a preliminary matter is that the Court designate a date, possibly two weeks hence, at which we can have a conference, pre-trial conference, under Rule 16 or under the inherent power of the Court to, at any point in a proceeding, take hold of the proceeding and find out what the remaining issues are, in order that we can determine what time will be required to hear the rest of the case.

Judge Jackson: Could that be done now?

Mr. Steffen: It could be done now, as far as we are concerned; but I think the defendants are perhaps entitled to more time, because what I would specifically want to know would be the categories of evidence which they feel they are now entitled to put in, in view of the holding of the Supreme Court.

I think that there is no question of the power of the Court to proceed; it is a question of whether your Honors feel [fol. 11] that that is the most expeditious way of getting at this matter.

Chief Justice Stephens: Thank you, Mr. Steffen.

What do the defendants have to say, if anything, on this subject of further proceedings?

STATEMENT ON BEHALF OF THE DEFENDANTS

By Mr. Bromley:

Mr. Bromley: May it please the Court, what I have to say depends to some extent upon an understanding of what the opinion of the Supreme Court means. I am sure that I am not clear about that, nor am I clear as to the Government's position as to what it means.

I should think that if the Government thought that the opinion meant that a mere plurality of licenses which resulted in the licensing of an entire industry with price fixing under bulletins was illegal, that they would take an affirmative step, say in the way of a motion for summary judgment.

There has been some talk between some representatives of the Department and me about that matter. I take it that they have not, as yet, made up their minds.

It seems perfectly clear, however, that if they make up their minds that they can not prevail in such a motion, that then the Government and the defendants would be in agreement on the proposition that the Supreme Court did not mean to announce any such doctrine as that a mere plurality of licenses extending industrywide with price fixing under bulletins resulted in a violation of the Sher- [fol. 12] man Act.

Judge Garrett: Mr. Bromley, may I inquire?

A motion for reconsideration by the Supreme Court was made, was it not?

Mr. Bromley: Yes, your Honor.

Judge Garrett: It was denied, without opinion?

Mr. Bromley: Yes, your Honor.

Judge Garrett: May I inquire: Were they asked to clarify that point in the motion for the new trial?

Mr. Bromley: No, your Honor, not specifically.

Chief Justice Stephens: Proceed, Mr. Bromley.

Mr. Bromley: Therefore, I should like to devote a few moments to a consideration of what I think the opinion of the Supreme Court means.

I suppose we can start off on the proposition, as to which there will be no disagreement——

Chief Justice Stephens: (Interrupting) Before you proceed, let me send for some material.

(Short interval.)

Chief Justice Stephens: Proceed.

Mr. Bromley: We can all agree, I think, that the Supreme Court has not overruled the General Electric case and that it stands today, still stands, as the law. I refer in support of that, if any support is needed, particularly to the Line Material opinion, on pages 23 of the slip opin-[fol. 13] ion, in which the Court said that it was "called upon to make an adjustment between the lawful restraint on trade of the patent monopoly and the illegal restraint prohibited broadly by the Sherman Act," and then had this to say, and I quote it——

Chief Justice Stephens: (Interposing) What page?

Mr. Bromley: Page 23 of the slip opinion in Line, the majority opinion. The first full paragraph on page 23. I have summarized the first sentence beginning "We are thus called upon", and I was about to read the second sentence.

> "That adjustment has already reached the point, as the precedents now stand, that a patentee may validly license a competitor to make and vend with a price limitation under the General Electric case and that the grant of patent rights is the limit of freedom from competition under the cases first cited at note 22."

So, I say the General Electric case has not been overruled.

Chief Justice Stephens: Let me read that again. I am sorry, I don't put my eye on it.

Mr. Bromley: That is page 23, the first full paragraph, about seven lines down, beginning "We are thus called upon".

Chief Justice Stephens: There were several opinions in that case.

Mr. Bromley: Yes, sir, this is the first, majority; the first, page 23. The paragraph begins "We are thus called [fol. 14] upon".

Chief Justice Stephens: Yes, very well.

Mr. Bromley: So, with the General Electric case being still the law and not being overruled, I proceed to the second point, which I think is equally clear, and that is that a plurality of licenses is lawful. That is, perhaps I should say, a mere plurality of licenses; that, if all the proof amounted to was that there was a plurality of licenses, that ipso facto by itself would not offend the Sherman Act.

Now, I reach conclusion because, again, of the Line Material case in which there was a plurality of licenses, and it seems to me that the majority opinion—indeed, all the opinions—are implicit with the proposition that if there had been no cross licensing between Line and Southern the case would have been decided in favor of the defendants.

Again, at page 23 of Line Material, near the bottom, six lines up, the Court said:

> "Where two or more patentees with competitive, non-infringing patents combine them and fix prices on all devices produced under any of the patents, comcompetition is impeded to a greater degree than where a single patentee fixes prices for his licensees."

I gain support for my position from the fact that I consider that to be an explicit recognition of the legality of plurality of licenses. Furthermore, and perhaps more [fol. 15] important than a mere passing phrase from a sentence, it would have been completely unnecessary to have considered the cross-licensing feature of the case in Line Material if the Court had been of a view that a plurality of licenses extending throughout an industry, as it did there, by itself would have offended the Sherman Act.

So, I say the General Electric case is still law and both cases, Line and Gypsum, recognize that in some circumstances—which I will proceed to consider later—plurality of licenses is still lawful and mere plurality of licenses does not offend the Sherman Act.

Now, coming to our case: Just what did the Supreme Court mean in holding that under the licenses and the price bulletins there was a prima facie case of illegality which made the declarations receivable against all?

I know that there are sentences in the opinion in the

Gypsum case such as the one beginning in the fourth line on page 34, the fourth line from the top on page 34, of the majority opinion in the Gypsum case:

> "These licenses and bulletins show plainly a conspiracy to violate the Sherman Act."

Well, read alone and isolated one might think that that was a statement that the licenses and bulletins in our case without more, without any more, had been adjudicated to be violative of the Sherman Act; but I do not believe that [fol. 16] that can be said to be the intent of the opinion, and I call attention to the bottom of page 34, in the last paragraph, the fifth line up from the bottom, in which the Court is speaking of the General Electric case and says:

> "That case"—meaning General Electric—"gives no support for a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stablilized."

Then, on page 35, five lines from the top, the Supreme Court, it seems to me, sums up the situation in these words:

> "Even in the absence of the specific abuses in this case, which fall within the traditional prohibitions of the Sherman Act, it would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices."

Now, I submit that that enunciates a doctrine which draws a very fine line indeed. It does not quite approach the theory of the complaint and the theory about which we [fol. 17] had so much argument—that is, sham. In my judgment, it does not say that the licenses need be sham. I think it completely misinterprets the position of this Court with respect to that proposition but I think that it holds

that something less than a conspiracy to utilize licenses as a sham or a cloak or a cover-up may still offend the Sherman Act and that something less is to be found in the words "acted in concert".

Now, giving the opinion all the force that it should be given, this would mean that if there was an agreement among the licensor and the licensees that prices were to be fixed and the industry regulated and prices stabilized, that would be a step beyond the permissible limit of the patent monopoly, even if that plan or agreed concert of action was to be effectuated by license agreements.

Now, of course, as this Court's opinion so clearly pointed out, it is very difficult to see any real distinction in the result between the negotiations which, necessarily, must accompany the issuance and acceptance of licenses and the discussions which, necessarily, must be carried on with respect to them and the position of the Supreme Court, as I read it, that those negotiations may be lawful but they are not lawful if they have resulted in an understanding throughout the industry that the industry is to be regulated and prices are to be fixed and it is understood that the licensor—that is, the patent owner—when he issues the [fol. 18] licenses does so for the purpose of regulating and stabilizing the industry, and it is not merely a patentee acting independently and for the protection of his patent and for the realization of the maximum profit therefrom.

Issuing licenses with the same terms—the latter would be all right, if a licensor sent out to everybody in the industry an identical license with price fixing and all the other provisions contained in the licenses in this case, and there wasn't a word said by anybody except everybody sent the licenses back signed—I take it that under the doctrine of the Supreme Court in this very Gypsum situation, they would say that was lawful, but if the preceding discussions and negotiations, as colored by the declarations, lead to the conclusion that the action was not the independent action of the licensor but was understood by everybody to be an arrangement to stabilize the industry pricewise and in other respects, too, then I think the Supreme Court by this opinion has said that that would offend the Sherman Act.

But the point that I want to make is that it still leaves

the defendants with a defense to put in, and that defense is to show that the true facts here fall into the permissible category and not into the illegal.

I think we are entitled to show a thing which we have not shown, which has not been shown in this case to any considerable degree, that the licensor in this situation acted [fol. 19] with complete independence and never was a party to any understanding or arrangement with any licensee with regard to the stabilization of the industry. I think we are entitled to show by witnesses and lawyers connected with the licensor during the times in question that all that was done was for the owner of a patent to protect his rights; to sue those who infringed it, to try to collect damages from those, and to offer a license to anybody who wanted it, completely without regard to whether all would take it or whether only one would take it or whether two or three, and I think if we establish that through the testimony of the licensor and perhaps from some of the licensees who have not been heard from, that we may succeed in convincing the trier of the facts that there was no pre-arrangement but that all that went on here was merely the normal activities of a licensor interested in preserving his patent and his position.

Now that, in very brief outline, is my position with respect to the meaning of the decision and with respect to what it is I desire to put in by way of defense. Of course, there are collateral issues, such as the elimination of jobbers and open-edge board and the alleged resale price fixing and operations of Board Survey, as to which we also would desire to offer additional evidence through the lips of the secretaries of Board Survey who ran Board Survey and who conducted the correspondence in the effort to en- [fol. 20] force the licenses and through the sales people and others to explain the origin, meaning, extent, and effect of the provisions with regard to the imposition of royalties on all products whether patented or unpatented, and so with respect to every one of the four collateral issues.

We think we are entitled now to put in that kind of a defense, and we think that the clear meaning of the opinion of the Supreme Court gives room to defend on those grounds and that the Government still has the burden of

showing that there was a pre-arranged scheme which went beyond the mere activity of a patent owner in doing what the General Electric case says he could do—that is, license with price fixing.

Chief Justice Stephens: Any other representatives of the defendants wish to be heard?

(No response.)

Chief Justice Stephens: Mr. Steffen?

FURTHER STATEMENT ON BEHALF OF THE PLAINTIFF

By Mr. Steffen:

Mr. Steffen. I would like to say just a few words in connection with Mr. Bromley's argument, your Honor.

With respect to the motion for summary judgment, our purpose, in part, in holding a pre-trial conference in order to determine what the actual issues are, is to determine whether we are in position to proceed to move for summary judgment. I think we will have to define them somewhat [fol. 21] more definitely than we have before we can take a position on that.

I would like now to reply, in part, to Mr. Bromley's statement with respect to the petition for rehearing before the United States Supreme Court. I don't know that Mr. Bromley gave Judge Garrett quite the right impression.

There was a petition for a rehearing, and in that petition for a rehearing the defendants made the very point which Mr. Bromley has urged here this morning; that is, that under the Line Material case that if there was not something more than a mere plurality of licensing, that it might be perfectly legal.

His first point was that the General Electric case has not been overruled.

Chief Justice Stephens: Referring now to petition for rehearing?

Mr. Steffen: I am referring to Mr. Bromley's argument and to page 6 of the petition for rehearing.

Chief Justice Stephens: Judge Garrett wants a copy of that petition, and I have an extra one here.

Mr. Steffen: That is page 6, Judge Garrett, along about about the middle of paragraph (c).

Judge Garrett: Whereabouts, on page 6?

Mr. Steffen: Beginning with the words "If the rule", about the middle of paragraph (c) on page 6.

I am calling your Honors' attention to this, because this was the argument made before the Supreme Court on the [fol. 22] petition for rehearing, and they there said:

> "If the rule of the General Electric case recognizes the right, as we insist it must, of the patentee to licensee the industry, how could the intention of the patentee disclosed to its licensees or the intention of the patentee and some or all of its licensees to make the licenses 'industry-wide', take the case out of the rule of the General Electric case?"

In other words, they raised exactly the point there that is being urged here, and our contention is clear that if those arguments were presented to the United States Supreme Court on their petition for rehearing and the petition was denied, it is equivalent to a ruling contrary to their argument.

Now they are a little more explicit. Mr. Bromley argued that the Line Material case went the way that it did only because of the fact that it involved cross-licensing, and if it were merely a plurality of licenses, that the court might have decided the other way. And to show that he made that argument to the Supreme Court also, refer to page 9 in the middle of the first paragraph, where it says:

> "If that case, instead of involving cross-licensing which was the turning point in the opinion, had involved merely plurality of licenses, the Court would [fol. 23] have been compelled under the language of its own opinion to affirm the District Court, for did not the Court say that the adjustment between the lawful restraint of the patent monopoly and the illegal restraint prohibited broadly by the Sherman Act had reached the point, as the precedents now stand, that a patentee may validly license a competitor to make and vend with a price limitation under the General Electric case?"

In other words, the two points with which Mr. Bromley started out this morning have been presented, were presented to the Supreme Court; and the Court in its refusal to grant a rehearing must be deemed to have been fully advised of the arguments that are now being made and to have taken the position that they did not affect the generality of the language which Mr. Bromley was reading from its opinion.

Now, I think that the language of the Supreme Court in the Gypsum case is extremely broad and that it reaches to the point of saying, just as we argued, may I say, back at the time of the trial, that any combination of competitors which has the result of organizing an industry and effecting a stabilization of prices, together with a regulation of distribution, is illegal.

Now, the language—there are some sentences Mr. Bromley didn't quote, in the opinion. If you will look at page 5 of the opinion, there is a sentence that, it seems to me, [fol. 24] answers this case. It says:

> "The rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly."

Now, there are no "ifs, ands, and buts"; that is just a flat statement that where you have an entire industry organized under patent licensing agreements and where, as in this case, you have admitted price fixing, you have admitted control of distribution, that those rewards which are derived from that combination do not flow from the patent, and it follows, of necessity, as we see it, that the combination, which I take it is agreed to—Mr. Bromley doesn't suggest that he is going to challenge the question of whether they fixed prices—I think it is perfectly clear they did fix prices, and he said in his opening statement that they did fix prices among their competitors—that the combination is such that there is no question but what they have regulated distribution through the price bulletins; there is no question that they have placed their regulations under Board Survey; there is no real question that they

eliminated jobbers by virtue of their leveling off of the price; therefore, that it is squarely a combination of an entire industry squarely within the language of the Court [fol. 25] to restrain commerce, and it is unlawful under the Act.

Now, if that is the case—and that is our position—then the matters which caused us much debate when the case was here before, as to whether or not there was sham in the situation, is out the window. Sham is no longer important. The case is simply one of: Did you combine and organize an industry and are you today, or at least as of November, 1929, were you, a combination of all the competitors astride the industry, fixing prices, organizing it? And, if so, regardless of how you got there—this is an equity case—regardless of how you got there, you are a combination in restraint of trade, and the rewards which you are getting, the Court said, are not rewards flowing from the patent and they are not protected by anything said in the General Electric case.

The Court's language on that is extremely potent, we think. The Court said:

> "That case gives no support"——

Chief Justice Stephens: What page?

Mr. Steffen: I have the Federal supplement. I think it is on page 34.

Chief Justice Stephens: Of the Gypsum opinion of the Court?

Mr. Steffen: Page 34 of the slip opinion.

> "That case gives no support for a patentee, acting [fol. 26] in concert with all members of an industry, to issue substantially identical licenses to all members of the industry."

There isn't any question but what they have acted in concert. Whether there was pre-concert to do this is beside the point. They did act in concert.

They did "issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed," competitors, that is,

jobbers, "squeezed out, and prices on unpatented products stabilized."

Now, the Court said:

> "Even in the absence of specific abuses in this case" —that is, even in the absence of eliminating jobbers or stabilizing or tampering with price of plaster or matters of that sort which would normally make a case.
>
> "Even in the absence of specific abuses in this case, which fall within the traditional prohibitions of the Sherman Act, it would be sufficient to show that the defendants,"—and this is the case—constituting all former competitors in an entire industry,"—there is no question about that; they are all former competitors in the entire industry—"had acted in concert to [fol. 27] restrain commerce"—and from 1929 on, to date, we showed an abundance of concerted action; licensee meetings, the price bulletin, the Board Survey, they were acting in concert from then on most certainly —"had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices."

In other words, the Court says that if you have got concerted action, you have got stabilization of prices among erstwhile competitors. The fact that they may — used the patents, the fact that any particular patent license may have been lawful is immaterial. You may use lawful steps to carry out an unlawful restraint or combination in restraint of trade.

Now, if that is all true—and that is the Government's position, your Honors, it leaves very little for the defendants, if anything, to introduce by way of evidence.

Judge Jackson: That would all depend upon our interpretation of the Supreme Court's opinion?

Mr. Steffen: Yes, and it is a law question, and our thought in the matter, your Honor, is that in order to save a lot of waste motion possibly we could get some sort of an understanding on that in these early stages. It seems to us that we ought to come to some agreement on how much

evidence and on what categories of evidence the defend-
[fol. 28] ants should be permitted to proceed.

Then, if we get the matter to a point where we feel that there isn't anything substantial left, we will then, if necessary, move for summary judgment. That would be one way to bring the matter to a head, but we do not have any desire to do that if there is any way of getting at it in a more satisfactory manner.

But our position is clear, that the whole question of sham and the whole question of whether the rewards are beyond what is proper under the General Electric doctrine are out; and that leaves you with nothing but an existing combination—note carefully that while we went in with great care back in 1925 to '29 and into how the thing started, much of that, I feel, today is unnecessary. The fact that we are dealing right now with a combination in existence and the fact that it does restrain trade (inasmuch as the Court says that the rewards are beyond what they were entitled to under their patents) are ground for equitable intervention.

I might point out further that much of Mr. Bromley's testimony or prospective testimony concerning the patent infringement and litigation, and so on, doesn't quite reach this case. This case, as it is looked at now, the licenses that are now before your Honors were signed in November, 1929, and there isn't much doubt on the record—and I would like to hear from Mr. Bromley if he has any real
[fol. 29] doubt on the matter—not much doubt on the record that from the time of the May, 1929, agreement and during the summer of 1929 that the whole industry did meet and that the whole industry did discuss in great detail the licenses under the Foam Patent and the licenses under the Starch Patent, so there isn't any question but what there was pre-concert in the sense of getting together with the idea of having the whole industry licensed.

We have the National Gypsum Company and even Mr. Finck in his opening statement saying that they went into the November licenses and only went into them the way they did on the understanding that the whole industry would come together and there would be a lawful price control. He was in eror as to "lawful", according to the Su-

preme Court, but there is no doubt that that is what they intended to do.

I should like to hear further from Mr. Bromley if he would care to be a little more precise on what he feels he could introduce. I think it has a definite bearing on when you may set the case for trial, how long it would take, and on the question of whether we feel we should move for summary judgment.

Chief Justice Stephens: Let me ask you one further question. Is it the purpose of the Government to introdue evidence with respect to the validity of the patents?

Mr. Steffen: We would like to hold that to one side. I would say frankly, your Honor, we haven't made up our [fol. 30] mind entirely. If this case can be handled without it, we would be very glad to. It opens up another topic, which it seems to us would take quite a lot of time.

We want to reserve our rights, but we have no immediate intention of doing that.

Chief Justice Stephens: Mr. Bromley, do you wish to be heard further?

FURTHER STATEMENT ON BEHALF OF THE DEFENDANTS

By Mr. Bromley:

Mr. Bromley: May it please the Court. I still do not understand the Government's position with respect to the opinion.

Judge Jackson: But, Mr. Bromley, if we should disagree with your interpretation of that opinion, then the motion for summary judgment would be in order?

Mr. Bromley: Yes, sir, if you disagreed with it to the extent of saying that a mere plurality of licenses offended the Sherman Act.

Judge Jackson: Under the circumstances of this case.

Mr. Bromley: Yes. But it isn't possible, it seems to me, to agree with Mr. Steffen's interpretation, if I understand it correctly, that is, that the mere taking of the licenses in the circumstances was action in concert, and that you don't need to show any pre-concert, as he called it.

Maybe he has put his finger on a distinction which I had [fol. 31] not made clear. Maybe there is a difference be-

tween concert in taking the licenses and pre-concert in agreeing to a plan of industry stabilization through licenses; but if the Supreme Court did not mean by its opinion that there must be a prearrangement, a plan to stabilize the industry in the sense in which I have been trying to say it, why in the world would the Supreme Court say, as it did at the bottom of page 27 of the opinion, "The trial court made findings of fact which if accurate would bar a reversal of its order"?

Now, what in the world can that mean, especially when one turns over the page and finds that the Supreme Court goes right away to Finding 118?

The very next sentence is:

> "In Finding 118 the trial court found that the evidence 'fails to establish that the defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize prices.' "

Doesn't that mean that the defendants should be permitted to show, if they can, that there was no plan?

Now, how can they show there was no plan?

Let's go to the May, 1929, meetings. It depends upon what the evidence shows was the purpose of those meetings and what went on at the meetings.

Judge Jackson: Wasn't that all thoroughly brought out in the Government's case by your cross-examination as far [fol. 32] as you and your clients are concerned?

Mr. Bromley: No, sir.

Judge Jackson: I thought it was.

Mr. Bromley: Yes, your Honor's statement is quite right with this exception: We have not presented the evidence from the lips of any representative of the licensor. For instance, neither Mr. Avery nor Mr. McLeish, the lawyer at whose instance the meetings were called, who participated in the discussions and negotiations that went on there, have told the story from their standpoint, and they are the only ones who know the whole story.

Judge Jackson: What difference would that make in view of the record as it stands now?

Mr. Bromley: Well, might this not make a difference, sir: Suppose that after the men got to the meetings negotia-

tions were conducted by the licensor's counsel separately with each licensee, that there never was any joint discussions which could possibly be susceptible of the inference that there was a common understanding that licenses would be issued and that the licensor would exercise his right to fix prices?

Judge Jackson: You think that would change, then, the ultimate situation?

Mr. Bromley: Yes, sir, I think that if we could show that it was the licensor's position that it didn't become a party [fol. 33] to any understanding at all, that it never indicated that it would fix prices, that it would do anything—all it did would sign a contract that gave it the right, if it wanted to, to fix prices—and if we could show that the negotiations that there were conducted were separate independent negotiations conducted with each one separately in a different room without any common meeting or any discussion which in words or inferences could possibly justify the conclusion that there was an arrangement among everybody to stabilize the industry as distinct from a straightforward negotiation to offer and take a license —I say, again, if we could show—and I say this only for purposes of illustration—that there never was a May meeting, that instead of that we wrote identical letters to every licensee on May 21, 1929, and enclosed a copy of the license and we got the signed copy back, I think that would be a good defense. No discussion of any kind; the parties never met—suppose, I could prove that, that they never met, just sent the licenses out and they were signed?

Now, all I am struggling to point out in answering your Honor's question is that there is some defense which this opinion allows us to put in.

The most extreme illustration that I can think of is the one I mentioned, that the parties never met, but they sent out the licenses on the same day, if you will, with an identical letter and an identical license, and they came back all [fol. 34] signed.

Now, that might raise an inference under the Interstate Circuit case, that there must have been an understanding, else they wouldn't have all come back, else they wouldn't have all been sent out on the same day. But surely the

defendants ought to be permitted to call the man who wrote the letter from the licensor to testify that he never talked to anybody and he did it on his own volition and independently and that he had no understanding that if the licenses were signed that he would fix prices—sure, the right was reserved in the license; he had no understanding that he would stabilize the industry, nor that he even would fix a price.

Judge Jackson: But you are up against the barrier, aren't you, that price fixing was had and stabilization did occur?

How are you going to get over that?

Mr. Bromley: Well, I can't deny the fact that prices were fixed until 1941. If there had been an arrangement, I urge, to stabilize the industry, we would not have stopped price fixing when our fundamental Starch Patent ran out, but I don't think it conclusive against us, sir, that there was price fixing. I do not think we are condemned unless you find that the price fixing which we did was done pursuant to a pre-concert understanding that we would do so, and that it was the purpose of the licenses to stabilize the industry and not the purpose merely of the patent owner [fol. 35] to realize the full benefit of his patent.

I know that is a very, very fine line.

Judge Garrett: Mr. Bromley, may I interrupt for a moment?

On page 33 of this opinion, that paragraph beginning "The trial court made many other findings to which the government objected", and so on, and which winds up, "Enough has been said as to the findings and the evidence, we think, to enable the District Court to pass upon the facts that may come before it on further proceedings in accord with our present ruling."

Now, we made findings of fact which the Supreme Court has expressly reversed and giving their authority for doing so. What is the significance of that?

Suppose you make the proof? Suppose you call Mr. Avery, suppose you call Mr. McLeish, and they testify as you think they will; how far does that get us?

Would not the Supreme Court again say, if we should hold that that established the crossing of that fine line to

which you refer, in the light of all the reasoning of the Supreme Court herein its statement—would not the Supreme Court again say, "Well, we don't think that is so"?

I just wonder about it.

Mr. Bromley: I can't believe that, if this Court was convinced by the evidence that we introduced sufficiently to make a new Finding 118, that the Supreme Court would upset it again. I can't believe that would happen, because [fol. 36] that presumably would be done with a view of the case which the Supreme Court has announced, that is to say, there must be proof that there was some arrangement, some action which was understood to be concert of action to secure stabilization of the industry, as distinguished from the mere taking of the licenses, even though the taking might be said to be in concert in the sense that all took the '29 licenses at or about the same time.

I don't think that is the kind of concert of action that the Supreme Court is talking about. I think, in these many sentences—While I am on that subject, page 23, I think, is an illustration of what I am talking about, starting at the very top of the page:

> "A consideration of that point"—they are talking about declarations—"really involves the heart of the case since the treatment of the declarations may vitally affect the outcome."

Now, how could the treatment of the declarations vitally affect the outcome unless the Court was thinking there must be proof of something more than the mere taking of the licenses?

When you reflect upon the nature of the declarations and reflect that the Supreme Court is saying if the Court had received all these declarations and treated them as evidence binding on everbody, it might have reached a different conclusion. About what? About whether or not there was [fol. 37] a plan. What kind of a plan? A pre-arrangement, a plan to stabilize the industry and not merely a determination on the part of the licensor to gain the full benefit of his patent, which was acquiesced in by the licensees when they took the licenses.

Chief Justice Stephens: What about the next statement, two sentences below, Mr. Bromley, where the Court says:

> "We think that the industry-wide agreements entered into with knowledge on the part of the licensor and licensees of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins, were sufficient to establish a prima facie case of conspiracy."?

Now, is there any dispute of fact in the case that there were industry-wide license agreements?

Mr. Bromley: No, sir.

Chief Justice Stephens: Entered into with knowledge on the part of licensor and licensees of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins?

Mr. Bromley: Well, now, I have difficulty with admitting that in this case the industry-wide license agreements were entered into with knowledge of the adherence of the others, because I don't think you can tell what they are talking [fol. 38] about. If they are talking about "entered into with knowledge of everybody that there was a pre-arrangement, that there was a plan to stabilize the industry," which is something bigger than a mere licensor's determination to license, then that makes sense; and that is what I think they are talking about.

I don't think they meant to say that if industry-wide license agreements are entered into and at the time they are entered into everybody knows what everybody else is doing, that would be bad; but if you could prove that nobody knew what anybody else was doing, then industry-wide licenses wouldn't be bad. They can't mean that. That doesn't make any sense. I think they are merely stating the conventional doctrine that where there is an illegal conspiracy and somebody comes along and enters into the arrangements with knowledge of the conspiracy, he becomes a part of the conspiracy.

Now, I gain comfort for that, because of the preceding sentence, if your Honor pleases, as well as the succeeding sentence. The preceding sentence is:

> "Some may have doubts as to whether the agreements and bulletins are sufficient to establish a con-

spiracy but the admission of the separate declarations against all greatly strengthens the government's position."

Chief Justice Stephens: And the Supreme Court has abolished, has it not, the declarations rule; or has it?

[fol. 39] Mr. Bromley: I just don't know. It seems to me it probably has.

Judge Garrett: It certainly held that the declarations of one party can be taken against the whole.

Chief Justice Stephens: Where is the comment on the declarations?

Judge Jackson: That is in this case, the circumstances of this case.

Judge Garrett: That is what I mean.

Chief Justice Stephens: In effect, that is the declarations part of the case that you have just been reading.

Mr. Bromley: Yes.

Judge Garrett: (Reading)

"We are unable to accept, however, the ruling of the court that declarations of each defendant were admissible only against the defendant making the declaration."

And immediately they hold that it is admissible against all. That is the way I interpret it.

Chief Justice Stephens: The Court goes on to say:

"Each licensee, as is shown by the uncontradicted references to the meetings and discussions that were preliminary to the execution of the licenses could not have failed to be aware of the intention of United States Gypsum and the other licensees to make the [fol. 40] arrangements for licenses industry wide. The license agreements themselves, on their face, showed this purpose."

It seems to indicate in that part of the opinion that the undisputed contents of the license agreements convict the defendants of a conspiracy.

Mr. Bromley: Well, I have great difficulty seeing how the license agreements themselves showed the purpose re-

ferred to in the preceding sentence. What they say in the preceding sentence is that,

> "Each licensee . . . could not have failed to be aware of the intention of United States Gypsum and the other licensees to make the arrangements for licenses industry wide."

The Court evidently concluded that there was a prima facie case of a pre-arrangement, and all that sentence means is that in their view, there being a pre-arrangement, they were convinced that everybody knew about it, and I think the statement that the license agreements showed this on their face may only mean to say that you can make an inference from the fact that the agreements were all the same, that there was a pre-arrangement.

Of course, that, I submit, respectfully, is absurd because license agreements would have to be all the same.

Chief Justice Stephens: Anything further from any other defendant's counsel?

[fol. 41] (No response.)

Mr. Bromley: I think probably, with respect to the declarations rule—I don't know that they have abolished the rule, but they have merely said that there was a sufficient prima facie case of a combination to make the declarations admissible.

Chief Justice Stephens: That may be.

Anything else from any other defendant's counsel?

(No response.)

Mr. Bromley: I wonder if the Government—

Chief Justice Stephens: (Interposing) I am sorry, Mr. Bromley, I thought you were through.

Mr. Bromley: I wonder, if the Government goes through with this idea, if it wouldn't be a good thing for them to serve interrogatories on us so we can have an opportunity get a definite question and give a definite answer?

Judge Jackson: As to what?

Mr. Bromley: They say they want to ask us some questions, I suppose to bring out what it is we want to prove.

Wouldn't the best way to do that be for them to serve interrogatories upon us?

Does that appeal to you (addressingg Mr. Steffen)?

(No response.)

Chief Justice Stephens: If there is nothing else to be said for the moment by either government or defendants— [fol. 42] I am sorry, Mr. Bromley, I thought you had finished.

Mr. Bromley: I had finished, except I did want to say that we feel we are entitled to know from the Government whether their case is going to stay rested or not, that they should tell us before we go ahead whether they will attack the validity of the patents or not, because that is part of their case.

Judge Jackson: I thought that was answered by Mr. Steffen.

Mr. Bromley: He said he hadn't made up his mind.

Judge Jackson: Well, he said he hoped he wouldn't have to and didn't intend to at the moment but didn't want to relinquish his right of rebuttal.

Chief Justice Stephens: Well, the defendants would be entitled to sufficient notice to prepare to meet that kind of case if the Government should decide to proceed; and before any actual resumption of the trial is reached, I think each side ought to know, as far as they properly can, of the plans of the other with respect to proof so that preparations can be made on both sides.

Mr. Bromley, assuming that the case goes forward on your theory, how long do you estimate it would take to put in the defendants' case?

Mr. Bromley: Four or five weeks.

Chief Justice Stephens: And will the Government expect to have rebuttal, or is that too much to ask?

[fol. 43] Mr. Steffen: We would have to reserve our rights, your Honor. I might say I think three or four weeks is a very long time if all Mr. Bromley is going to put in evidence on is this very, very fine line concerning pre-concert.

Mr. Bromley: Well, that is not all. As I said, I am going to call witnesses about Board Survey and about elimination of open edge board and the alleged fixing of

resale prices. Those findings have been set aside. We want to have them reinstated.

Chief Justice Stephens: We will recess for fifteen minutes.

(Recess, 11:09 a.m. to 11:24 a.m.)

Chief Justice Stephens: I suppose the Clerk should call the roll and see that everyone is present or accounted for.

Is everyone represented here this morning, do you know, Mr. Bromley?

Mr. Bromley: I think so, your Honor.

Chief Justice Stephens: Mr. Johnston is notable, by his absence.

Mr. Bromley: Yes, but he has someone here.

Chief Justice Stephens: The Court is of the view that there is nothing before it upon which to rule and that nothing could be before it upon which to rule by virtue of a pre-trial conference.

Further discussion such as we have indulged in this [fol. 44] morning might ensue, but still there would be nothing before us upon which to rule, and we think the only way to get a determination as to the meaning of this opinion of the Supreme Court is to get something before us on which to rule.

We entertain, therefore, a motion for summary judgment and request the Government to file a motion for summary judgment; and we request the defendants to make a proffer of such proof as they think they have a right to make in addition to making such contest as they wish to make on motion for summary judgment.

Then, we will have something before us upon which the Court can rule, as to what the meaning of the Supreme Court opinion is; and from that ruling, possibly further appeal can be taken for clarification to determine what its meaning is with respect to this situation.

I am frank to state, with all proper respect and deference to the higher tribunal, that I have difficulty in reaching a conclusion as to just what the opinion means on many of the matters that have been discussed here this morning, and the differences between counsel already discussed indicate that they are in a similar doubt, and we have nothing before us on which to rule.

I think I reflect the views of my colleagues. We have nothing before us upon which to rule, and the only way we can get a ruling is by having some sort of motion before us.

How soon can you make a motion for summary judg-
[fol. 45] ment, Mr. Steffen?

Mr. Steffen: May I confer with my colleagues?

Chief Justice Stephens: Surely.

Mr. Steffen: Your Honor, we are in doubt as to how we could prepare our motion for summary judgment until we had some showing from the defendants as to what they would put in by way of evidence; and if we could have that in writing, then we have our basis for formulating our motion for summary judgment.

Chief Justice Stephens: It doesn't seem to us that that is necessary, Mr. Steffen, because it is the Government's contention, as we understand it from your argument this morning, that the licensing system which is established here, admittedly under the license agreements and under the undisputed facts of the case, is a conspiracy in violation of the Sherman Act under the Supreme Court opinion.

Now, if that is true, if you are correct in that, you are entitled to summary judgment without reference to any testimony the defendants will put in.

Mr. Steffen: Secondly, your Honor, we might make our motion for summary judgment on the broader basis to the effect that there is no evidence that they could put in—that the evidence as we have it, apart from the per se character of the situation as we now have it, would not be adequate for purposes of making a defense, and I have in mind this situation: If it is Mr. Bromley's purpose to
[fol. 46] put in evidence concerning what took place during the summer of 1929 when they entered the November licenses, it seems to me that the evidence now in is fairly conclusive and insofar as he has disclosed what he would put in by way of evidence, it would be to call Mr. McLeish or Mr. Avery, or both, and that they would testify concerning what took place during the summer of 1929.

Now, our position or argument has been that the license agreements, the whole body of agreements plus what was done under the agreements, constitute a violation in the light of the Supreme Court's opinion. I do not wish to

be understood to say that we are throwing overboard everything that went before. The whole question of preconcert, we most certainly insist upon that likewise, but what we say is that the Court has gone to the point, as we read it, of saying that the fact that we now have existent, the combination, would alone be enough, but I don't want to be put in the position of not having the advantage of all other facts in the case.

Judge Jackson: You have the advantage of everything in the case so far.

Chief Justice Stephens: The Court is not trying to put you in any position at all. You are at liberty to take any position you want to take. We understand the contention of the Government to be that regardless of what has gone [fol. 47] before, under the opinion of the Supreme Court in the Gypsum case, this licensing system, the very licenses themselves, and the facts and terms thereof—that that is ipso facto illegal—and it may well be that that is what the Supreme Court means.

We don't presume to rule on that now one way or the other. I can see, however, that there may be some merit, Mr. Bromley, in Mr. Steffen's suggestion that it would be easier to deal with this situation expeditiously if, before the motion for summary judgment was filed, there was some indication by the defendants of the testimony that they would offer so that we could have an argument on the proffer of testimony as well as upon the summary judgment at the same time.

Possibly that could be arranged by agreement between counsel without disadvantage to either side.

I may say that we have in mind in suggesting this method of procedure not merely the getting of something before the Court on which we can rule and, perhaps as a result of that, get a definition, a more precise definition, of the opinion for the guidance of counsel and possibly of this Court itself, but also of helping the situation in this jurisdiction with respect to judges, which is desperate. Here I am now, Chief Justice of the United States Court of Appeals. I can't abscond from my duties for six months—and that is what six weeks is likely to mean in this kind of a case, because the Court of Customs and Patent Appeals judges, if they are to sit at all, would have to sit as we

[fol. 48] did before, a week or 10 days a month only. In addition to that, here is the situation in the Court of Customs and Patent Appeals. Judge Ambrose McConnell is ill, has been ill since December, has gone to Cuba for his health, and whether he will be back to work within a few weeks or a few months or ever is not known. Judge Bland has resigned, and his position has not been filled. The appointment has been made, but there is no confirmation, and whether confirmation will take place isn't known.

At the present time, if the two present members of the Court of Customs and Patent Appeals who are members of this District Court were to proceed to take several weeks or several months to try this case, the Court of Customs and Patent Appeals would have to stop operating.

Now, we must do something, if we properly can, with proper protection of the rights of the parties, to expedite these proceedings. Perhaps this may not result in expedition; perhaps our ruling on motion for summary judgment and proffer will be such that there will have to be a trial—perhaps not. But it seems to us we at least ought to try to clarify the meaning of this opinion if we can, for the guidance of all concerned.

Could you make a proffer within the next week, Mr. Bromley, of what you propose to prove if the case goes forward, if the summary judgment is denied?

[fol. 49] Mr. Bromley: I don't see how I can make an offer of proof until I know the grounds of his motion. I don't care who goes first and takes the burden, but it seems to me I have got to have an indication of what his grounds are, what it is that he relies upon, before I will know what it is that I will want to put in by way of defense.

Now, on these motions, it is customary to make the motion, having answering papers, and for the mover to have opportunity to reply. He gets the same chance at my offer of proof, even though it is done in the conventional way.

Chief Justice Stephens: I am not sure that I agree with you in that, Mr. Bromley, in this particular situation, because the Supreme Court has ruled—and we are all bound by its ruling—that the Government has made a case. Now,

we must respect and carry into effect that ruling with due deference to the higher tribunal.

Now, the burden is upon you to make your case from now on. We are willing to entertain, and do entertain, a motion for summary judgment, based upon the proposition of law that under this opinion on the record as now made, without reference to the proof which might be offered from the other side, the Government is entitled to summary judgment. But if we should deny that, it seems to me that in the interest of expedition we might properly ask you to present a statement of what you expect to prove in order, partly, to find out how long this case is [fol. 50] going to take and what can be done with this extremely awkward if not desperate situation with respect to the constitution of this Court and also to determine whether or not, under the Supreme Court opinion, that proof will avail you anything as a matter of law.

If we thought it wouldn't, what is the use of having a protracted trial?

Now, I can't compel you, of course—and wouldn't presume to—to make this proffer of proof sooner than you can properly do it, and if you insist that you cannot do it coincidently with the preparation of this motion for summary judgment, of course, the Court won't require you to do so.

I do think, Mr. Steffen, in view of your argument this morning, you ought to make a motion for summary judgment here based upon the facts and evidence and the Supreme Court opinion before the Court now, to determine whether or not, as a matter of law, on what is now before the Court in view of the Supreme Court opinion, you are entitled to a summary judgment in favor of the plaintiff.

If the Court should rule that you are, why, that is the end of the case, unless the defendants then take the case to the Supreme Court to see whether or not we have correctly construed it. If we rule you are not, then we will have to determine what you have to say and whether that will avail you anything as a matter of law.

[fol. 51] What we are , in effect, asking you to do, which seems to us not unjustifiable in view of the difficulty in which the Court finds itself, is to submit to us the nature

of your defense by way of a proffer, and we would, in effect, thereby, then be ruling on what under old common law practice would be the demurrer to your proposed evidence, and if we held that the demurrer was bad, why, then, you could put in your proof; otherwise, the case would be over then.

It seems to us that some such steps are proper and, indeed, almost necessary under the present situation.

How soon can you prepare and file a motion for summary judgment based upon what is now before the Court, including the Supreme Court opinion, and be ready to argue it?

Mr. Steffan: I should say a week or possibly 10 days. This is Tuesday.

Chief Justice Stephens: We would like to have you do that just as promptly as you can. If you can do it in a week, it would be much preferable.

Mr. Steffen: We will undertake to do it in a week.

Chief Justice Stephens: The defendant would have to have some opportunity to prepare to meet it, and we ought to set a time for argument as early as possible in what is left of this month. So, suppose we grant you one week's time.

We will grant you, then, a week from today, Mr. Steffen, to file a motion for summary judgment based not upon the [fol. 52] expected proof of the defendants but upon what is before the Court now, including the Supreme Court opinion.

That will help us to test out what is the apparent meaning of the opinion, by some definitive ruling.

Can you, in the mean time—or do you think you cannot properly prepare so that we can have submitted at the same time, within a week, your proffer for the defendants, Mr. Bromley?

Mr. Bromley: Well, we will try to do it. I am under a court order taking depositions every day, Ferguson v. Ford, which takes all of my time, but we will do our best to get a proffer prepared.

Chief Justice Stephens: Very well, and you will want some time after the week to prepare to meet the argument on the summary judgment, to prepare for that. Could

we fix some day on which we will reconvene the Court for the argument, both on the proffer and on the motion for summary judgment?

A week from today will be the 15th. Couldn't we have the argument on both of these matters on the 22nd?

Today is the 8th. You, Mr. Steffen, are to have until the 15th to prepare and file and serve upon the defendants motion for summary judgment; the defendants to have until the same date to prepare and file and serve upon you their proffer of proof. Could we not settle upon the 22nd, two weeks from today, for the argument on both the summary judgment and the proffer?

[fol. 53] Mr. Steffen: It is pretty hard to get out a brief in that time, your Honor. If we had two weeks—

Chief Justice Stephens: You could prepare your brief in typewritten form. You don't have to print the brief.

Mr. Steffen: We have always done that, but just the mechanical job—we might do it by the 29th.

Chief Justice Stephens: We are pressed to get this matter disposed of if we can reach any disposition of it in this way. I have six or eight weeks of accumulated work in the Court of Appeals yet, and some of it is in Government cases which are extremely pressing—a Securities and Exchange case and a Communications Commission case, which are extremely pressing.

We will set it for the 29th, then.

Judge Jackson: Would that be all right?

Chief Justice Stephens: That is agreeable to both sides.

So, to repeat that, on the 15th the Government's motion for summary judgment will be filed and served upon the defendants, and on the same day the defendants' proffer of proof in its case in defense will be filed and served upon the Government, and on the 29th we will hear argument on both the motion for summary judgment and the proffer at 10 o'clock in this court room.

While I think it is an unnecessary formality, if it is in accordance with the practice of the District Court here, we will sign this order vacating our order dismissing the [fol. 54] Government's case. This is dated May and should be dated June.

This is the original mandate, Mr. Clerk, which I will return to you for the files of the Clerk's office, and the

original order of this Court and the original findings of fact.

Mr. Marshal, will you hand those to the Clerk?

Is there anything further, gentlemen, before we recess until the 29th at 10 o'clock in this court room?

(No response.)

Chief Justice Stephens: If not, except to say that it is a pleasure to see you all again, we will adjourn until that date.

(Whereupon, at 11:49 a.m., an adjournment was taken until 10:00 o'clock a.m., June 29, 1948.)

[fol. 55] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT— Filed June 15, 1948

1. Plaintiff, by its attorneys named below, upon the pleadings and all the proceedings heretofore had herein, including but not limited to all exhibits and testimony of witnesses, the admissions by counsel for the defendants, hereby respectfully move this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in its favor; or, in the alternative,

2. If summary judgment is not rendered in plaintiff's favor upon the whole case or for all the relief asked and further trial is necessary, that the Court, at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and

directing such further proceedings in the action as are just.

Dated une 15, 1948.

Roscoe T. Steffen, Edward Knuff, Special Assistants to the Attorney General, Attorneys for Plaintiff.

[fol. 56] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DEFENDANTS' U. S. GYPSUM COMPANY, ET AL., OFFER OF PROOF—Filed June 15, 1948

Pursuant to the Court's request of June 8, 1948, the defendants offer to prove the following facts by witnesses to be sworn and documents to be produced upon the resumption of the trial herein:

1. There was no agreement or understanding between the United States Gypsum Company (U.S.G), patentee, and the other defendants or any of them that they would associate themselves in a plan to blanket the industry under patent licenses and stabilize prices or issue or cause to be issued substantially identical licenses to all of the defendants or any number of them.

2. There was no agreement or understanding between USG, patentee, and the other defendants or any of them, that there would be industry-wide licensing or that the licensor, under patent license agreements, would organize the industry and stabilize prices of patented gypsum board or any other product.

[fol. 57] 3. In offering and issuing licenses to the other defendants the licensor acted independently and not by virtue of any agreement or understanding with the other defendants or any of them that prices would be fixed or stabilized throughout the industry, or that the industry would be regulated or regimented.

4. At all times the licensor was willing to license any

one manufacturer without regard to whether or not a license was taken by any other manufacturer or manufacturers.

5. At all times from 1912 to date the sole interest of the licensor in enforcing its patent rights by litigation, in the settlement of its patent litigation, in the offering and issuance of its patent license agreements and in the enforcement thereof, was to secure to itself the full benefits of its patents and not to enter into a plan or scheme to stabilize the gypsum industry. The companies which became licensees did so because they desired to settle or avoid litigation and to obtain the right to use USG's patents, considering it a business necessity to be able to do so.

6. Beginning prior to 1912 and continuing thereafter USG developed by its own research the new closed-edge gypsum board and the processes for the manufacture of the same, and obtained, on August 6, 1912, Utzman Patent No. 1,034,746 covering said improved closed-edge board and subsequently other patents covering said improved board and processes for making the same, including Utzman Patent No. 1,330,413 covering a complete machine and apparatus for making said patented board, which was issued on February 10, 1920. All of these inventions were made by employees of USG in the performance by them of research work for which they were employed, and the appli- [fol. 58] cations for and letters patent for such inventions were duly assigned to USG as its own property.

7. A description of the methods of manufacture of gypsum board before and after the Utzman inventions, together with the costs of production and market conditions resulting in the demand of the trade for the improved closed-edge board to the exclusion of the open-edge board will be shown.

8. During the period from the commencement of the production of gypsum board under the Utzman patents until the granting of the licenses thereunder and continuing thereafter until the commencement of this suit open-edge board was unable to compete with the patented closed-edge board. The acceptance by the trade of the closed-edge patented board and the demand for it in the building industry supplanted the use and sale of the open-edge board.

9. The claims of said patents were infringed by the Bestwall Manufacturing Company (Bestwall), the American Gypsum Company (American), the Universal Gypsum and Lime Company (Universal), the National Gypsum Company (National), and the Niagara Gypsum Company (Niagara), all manufacturers of gypsum board in the Eastern area of the United States and by other manufacturers of gypsum board in such area, which infringements were compelled by the superior quality of the patented board and the demands of the trade therefor. The extent of such infringement and the cost to patentee in protecting the claims of its said patents and its damages suffered by reason of such infringement will also be shown.

10. USG, between 1917 and 1928, instituted suits for infringement against Bestwall, Beaver Products Company, Inc. (Beaver), American, Universal and National. In 1921 the United States Circuit Court of Appeals for the [fol. 59] Seventh Circuit, in a suit against Bestwall, held the patents of USG valid and infringed. Beaver, in the course of such litigation, had acquired Bestwall, and USG, by supplemental bill filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, sued both of these companies for infringement, in which suit a final judgment was entered in 1925 finding that said patents were infringed and enjoining and restraining the defendants from further infringement and directing an accounting for damages against the defendants.

11. USG, in addition to commencing such infringement suits, notified Niagara and other infringers of said patents that unless they ceased infringement, suit would be commenced against them for damages and for appropriate relief to prevent future infringement. In 1927 it also notified the Texas Cement Plaster Company (Texas), which had equipped its plant to make a closed-edge board, of USG's patent rights and that suit for infringement would be commenced if it produced a closed-edge board in its newly equipped plant. In the same year it notified the Atlantic Gypsum Products Company (Atlantic), which was about to equip its new plant to manufacture gypsum board, of USG's patent rights on closed-edge board and the processes for making the same.

12. Prior to the last mentioned judgment for infringement Beaver, by its president, A. S. Blagden, entered into negotiations for settlement of said infringement suits with S. L. Avery, president of USG, which negotiations continued until a final settlement was reached on July 29, 1926. At a meeting in December 1925 Mr. Avery specified as his terms of settlement the payment of damages for Beaver's infringement, acknowledgment of the validity of USG's [fol. 60] patents, payment of royalties, and the right in USG to fix the prices of patented board to be made and sold by Beaver. Settlement was made between the two companies on July 29, 1926, under the terms of which Beaver paid USG the sum of $250,000 cash damages and further agreed to pay to it in settlement of said claim and for the privilege of using said patents and making and selling patented board thereunder an amount equivalent to 5% of its selling price of all board sold by it until August 6, 1929, the date of the expiration of said Utzman patent No. 1,034,746, and thereafter an amount equivalent to 1½% of its selling price of all board sold by it from August 6, 1929, until February 10, 1937, the date of the expiration of said patent No. 1,330,413. As a part of the settlement USG, as licensor, and Beaver, as licensee, entered into the license agreement of July 29, 1926 (Gov. Ex. No. 1). The terms fixed by USG as a basis for the settlement and the license agreement with Beaver were the same terms demanded of each subsequent licensee of USG. USG did not deviate from those terms in any of its license agreements.

13. The license so granted to Beaver was separately and independently negotiated and entered into between USG, as licensor, and Beaver, as licensee, and there were no agreements or understandings to issue substantially identical licenses to any other member or members of the industry or that other members of the industry would take similar licenses under said patents.

14. The memorandum of December 12, 1925, sent by Mr. Blagden, president of Beaver, to Mr. Avery, president of USG, was not accepted or approved by Mr. Avery and was never at any time discussed by him with Blagden or anyone else, nor was the same referred to by either Avery [fol. 61] or Blagden during or after their negotiations. Mr. Avery never entered into any agreement or under-

standing with Mr. Blagden with respect to anything contained in such memorandum and particularly never agreed with him or anyone else that Beaver or Blagden would agree to use or use its or his best efforts to induce other members of the industry to accept similar licenses from USG, nor did he authorize it or him to do so.

15. Blagden of Beaver was not at any time authorized to represent USG or Avery in negotiations with other manufacturers of gypsum board. Any efforts which Blagden may have made to induce such other manufacturers to become licensees of USG were independent efforts of Blagden and were made without any authorization from USG or Avery, and were not the result of any agreement or understanding among the defendants or any of them.

16. Blagden's letter to Avery of October 1, 1926 (Gov. Ex. No. 189, R. 5349), in which he referred to the "entente cordial" between their two companies and stated that "if we play the game right it should bring about big things" was merely an expression of Blagden's opinion that it would be advantageous for USG and Beaver to live up to the terms of their license agreement, and was not understood by Avery or by Blagden as referring to any agreement or understanding among the defendants or any of them to fix prices or stabilize the gypsum industry.

17. Frank J. Griswold, general manager of American, was not at any time authorized to represent USG or Avery in negotiations with other manufacturers of gypsum board. While USG's infringement suits were pending [fol. 62] against American (September, 1925-November, 1929), Griswold's correspondence and conferences with representatives of various unlicensed manufacturers of gypsum board with respect to the possible acceptance by those manufacturers of licenses from USG did not receive any authorization from USG or Avery and did not result from any agreement or understanding among the defendants or any of them. Such correspondence and conferences were independently undertaken and conducted by Griswold in an attempt to obtain concessions and more favorable terms than those accorded by USG to other licensees if and when American should be able to settle its pending litigation and enter into a license agreement with USG, or were prompted by Griswold's activities in a proposed merger of certain

companies in which proposed merger neither USG nor Avery was interested.

18. Eugene Holland, who became president of Universal in 1928, was not at any time authorized to represent USG or Avery in negotiations with other manufacturers of gypsum board. Any efforts which Holland may have made to induce such other manufacturers to become licensees of USG were independent efforts of Holland, and were made without any authorization from USG or Avery, and were not the result of any agreement or understanding among the defendants or any of them.

19. In September 1926 Universal on its own initiative and without the intervention of any other party entered into negotiations with USG to settle the claim which the latter had against the former for infringement of the Utzman patents. In these negotiations Mr. Avery, on behalf of USG, insisted upon the same terms of settlement which he had specified in the negotiations with Beaver. On September 17, 1926, after protracted negotiations, an agree-[fol. 63]ment was reached by the parties under the terms of which Universal agreed to pay to USG in settlement of said claim the sum of $35,000 and 5% of licensee's selling price of all gypsum board manufactured and sold by it until August 6, 1929, and 1½% of such selling price from August 6, 1929, to February 10, 1937. On the same date a license agreement was entered into between the parties (Gov. Ex. No. 2).

20. This license was separately and independently negotiated and entered into between USG, as licensor, and Universal, as licensee, and there were no agreements or understandings of any kind to issue substantially identical licenses to any other member or members of the industry or that any other member of the industry would take a similar license under said patents. The negotiations were conducted soley between the parties to the license and involved no one else. Neither Blagden nor Griswold nor any other person or company except the parties to said license had anything to do with the negotiations for or the execution of the same.

21. In the spring of 1927 Atlantic, through its then president, applied to USG for a license under said patents in connection with a new plaster mill and board plant which

the former was installing at Portsmouth, New Hampshire. Negotiations between the two companies resulted in the execution on March 5, 1927, of a license agreement similar in terms to that of Beaver, except that there were no provisions for settlement of any claim for damages as Atlantic was not an infringer of said patents.

22. Texas, having equipped its plant to make a closed-edge board, applied for and received a license from USG under said patents similar in terms to that of Atlantic. [fol. 64] This license was executed on April 18, 1927.

23. The licenses so granted to Atlantic and Texas were each separately and independently negotiated and entered into between USG, as licensor, and Atlantic and Texas, respectively, as licensees, and there were no agreements or understandings of any kind to issue substantially identical licenses to any other member or members of the industry or that any other member of the industry would take a similar license under said patents. The negotiations were conducted solely between the parties to each license and involved no one else.

24. In January 1928 Certain-teed Products Corporation (Certain-teed), then making an open-edge board, had agreed to purchase the assets of Beaver, the consideration for which purchase was to be paid to the stockholders of Beaver, but under which arrangement Certain-teed had refused to assume the license agreement of Beaver with USG. USG thereupon brought an action in equity in the United States District Court for the Northern District of Illinois, Eastern Division to protect its claim of over one million dollars for prior infringement of its Utzman patents by Beaver. In order to prevent the entry of an order restraining the transfer of the proceeds of the sale to the stockholders of Beaver, Certain-teed was required to post a bond in the sum of one million dollars. Negotiations for settlement of this litigation by means of a license to Certain-teed under the Utzman patents continued intermittently from the time the bond was posted on March 28, 1929, until a settlement was finally arrived at in May 1929, which negotiations were carried on strictly between the parties involved.

25. With the pending litigation both for infringement of USG's patents against other members of the industry

[fol. 65] and of the suit to enjoin and the attendant bad feeling resulting therefrom, a price war broke out in the industry during which gypsum plaster products were selling below the cost of most of the companies manufacturing and selling such products.

26. By January 1929 American, National, Ebsary Gypsum Company (Ebsary) and Niagara had each inquired of USG for the terms upon which Mr. Avery would grant a license and for license agreements containing terms acceptable to USG. USG submitted to each of them forms of license agreements containing the terms originally specified by Mr. Avery as his terms of settlement. All of these companies except Ebsary were at the time infringing the Utzman patents. These inquiries were made to USG independently of one another.

27. On May 16, 1929, National, having obtained from USG a form of license agreement satisfactory to USG, executed the same and mailed it to USG. This agreement (Gov. Ex. No. 3) was substantially the same as the licenses granted to other licensees except for the amount of damages for infringement, which was different in each case. In this connection National agreed to pay to USG in settlement of the latter's claim for damages an amount equal to 5% of the selling price of licensee of all gypsum board, whether patented or unpatented, manufactured and sold by licensee until August 6, 1929, and thereafter 1½% of such selling price until February 10, 1937, and in addition thereto an amount equal to 3½% of such selling price from August 6, 1929, until said 3½% aggregated the sum of approximately $180,000.

28. Three unlicensed manufacturers, Certain-teed, Ebsary and Niagara were present at the meeting of certain licensed and unlicensed manufacturers in Chicago on May [fol. 66] 21, 1939, and after protracted negotiations, took licenses under said patents from USG. During the period of this meeting separate negotiations independent of one another were had with each of these companies, resulting in the Certain-teed case in a complete settlement of the litigation then pending, its assumption of Beaver's obligations with respect to past infringement, and the taking of a license (Gov. Ex. No. 4). In the case of Ebsary the matter was discussed with the company and its counsel, as a result of

which Ebsary agreed to take and did take a similar license (Gov. Ex. No. 5) except there was no claim for damages to be settled. Mr. Reeb of Niagara, in separate negotiations, settled USG's claim for infringement by agreeing to pay to USG an amount equal to 5% of the selling price of licensee of all gypsum board, whether patented or unpatented, manufactured and sold by licensee until August 6, 1929, and thereafter 1½% of such selling price until February 10, 1937, and in addition thereto an amount equal to 3½% of such selling price from August 6, 1929, until said 3½% shall aggregate the sum of $27,650.85. Niagara was granted a license under said patents, similar to the other licenses except for the amount of the claim for damages.

29. The licenses so granted to National, Certain-teed, Ebsary and Niagara were separately and independently negotiated and entered into between USG, as licensor, and National, Certain-teed, Ebsary and Niagara, respectively, as licensees. There was no agreement or understanding with USG to issue substantially identical licenses to National, Certain-teed, Ebsary and Niagara upon the condition that they or any two or more of them would take such licenses or that other members of the industry would take [fol. 67] similar licenses under said patents, each of them being free throughout the entire negotiations for said licenses to take or not to take a license according to its own individual determination.

30. It was not the fact that Mr. Avery or USG were not interested in negotiating settlement with others in the industry or granting such other licenses unless all board manufacturers or any one or more of them was included. Neither Mr. Avery nor any one on behalf of USG at any time stated or made it clear to any one that, if price-fixing could not be worked out or continued under the Utzman patent, there were other patents available for the purpose, nor was there any agreement or understanding at any time among the defendants or any of them to the effect that the expiration of the Utzman patent was not a practical reason for continuing the conflict in the industry.

31. On May 23, 1929, USG disclosed to its licensees the existence of the new bubble invention, which was a method of making a lighter and cheaper gypsum board by introducing soap foam in place of sawdust, for which an appli-

cation for letters patent had been filed. Sawdust was not only scarce and expensive but its use resulted in a heavy board costly to dry, ship and install. USG offered a license under the new bubble invention to any of its licensees who might be interested in taking it.

32. During the negotiations for the bubble license in the summer of 1929, Holland, president of Universal, charged USG with infringement of Universal's starch patents.

33. Universal's starch patents (the Haggerty and Hite patents) covered, respectively, gypsum board employing starch or a cooked carbohydrate in the core of the board [fol. 68] to insure a good bond between the core and the paper covering sheets (thus solving the "peeler" trouble in the gypsum board industry and making possible high speed production), and a heat insulating material and method of making the same. It was impossible to make a satisfactory gypsum board without using starch and the starch patents.

34. Upon investigation, Avery found that Holland's charge of infringement was well founded, and that USG was in fact infringing Universal's starch patents and had subjected itself to substantial claims for damages by so doing. USG accordingly determined to purchase the starch patents from Universal if it could, and thus relieve itself of substantial claims for infringement. As a result of negotiations between Holland and Avery, USG agreed to purchase and did purchase the Haggarty and Hite patents. Such negotiations were separately and independently conducted by Avery and Holland, and none of the other defendants was involved therein. Since Universal was in receivership, it became necessary to present the entire transaction to seven United States District Courts in which the receivership was pending, wherein the sale to USG by the receivers of Universal was approved. The sale of the starch patents was advantageous to the receivership because it provided Universal with funds which in time helped it to reorganize.

35. Following the purchase of the starch patent by USG from Universal, USG proposed to license its licensees under the bubble and starch patents. The terms and conditions of the license were discussed at a meeting in August, 1929, at which some of the licensees were present, and it was

finally left that USG would give the matter further consideration and submit a license containing terms and con- [fol. 69] ditions satisfactory to it. Each of the licensees was free to accept or reject the license according to its own independent determination.

36. The licenses, in the form of a single document replacing the prior license of the licensee and including the starch patents and bubble board applications, were subsequently mailed to the licensees. Niagara on October 8, 1929, Certain-teed on October 15, 1929, National on October 17, 1929, Ebsary on October 18, 1929, and Atlantic on October 21, 1929, accepted and executed such licenses with USG (Gov. Exs. 12, 10, 9, 11, and 7, respectively).

37. These licenses were separately and independently accepted by Niagara, Certain-teed, National, Ebsary, and Atlantic, respectively, as licensees. There was no agreement or understanding with USG to issue such licenses to them upon the condition that they or any two or more of them would accept identical licenses or that other members of the industry would take similar licenses under such patents. The receivers of Universal did not accept the license until the sale had been approved, and acted pursuant to the order and directions of the said District Courts which had been fully advised of the entire transaction. Neither American nor Texas nor Kelley Plasterboard Company (Kelley) had at this time accepted such a license.

38. On November 5, after approval of the sale, the starch patents were assigned to USG and on the same date the receivers of Universal, as authorized by court, accepted a license (Gov. Ex. No. 6).

39. On November 25, 1929, American settled all of its litigation with USG and accepted a license (Gov. Ex. No. 13).

40. Kelley accepted a license (Gov. Ex. No. 15) in April [fol. 70] of the following year. Texas, a licensee under the Utzman patents, did not accept a license under the starch and bubble patents until 1937, when the machine patent for making closed-edge board expired. This license was executed on February 10, 1937 (Gov. Ex. No. 8).

41. These last four licenses were each separately and independently negotiated and entered into between USG, as licensor, and said receivers, American, Kelley and Texas

respectively, as licensees, and there were no agreements or understandings of any kind with USG to issue identical licenses to them upon the condition that they or any two or more of them would accept such licenses or that other members of the industry would take similar licenses under said patents, but each of them was free to take or not take the license according to their or its own individual determination except only in so far as said receivers were acting under the order of court.

42. There was not any agreement or understanding among the defendants or any of them that the starch or bubble board patents of USG would be used as a subterfuge to support price control after the expiration of the closed-edge patent, and it is not the fact that those patents were used for any such purpose. The use of those patents by each manufacturer was essential in order to avoid possible suits for infringement and in order to obtain the advantages which resulted from the elimination of sawdust from the gypsum core, and from the elimination of the "peeler" problem, and it was for those reasons that each licensee accepted a license under such patents.

[fol. 71] 43. Newark Plaster Company (Newark) acquired the assets and business of Kelley and became the assignee under Kelley's license in 1939. The Celotex Corporation (Celotex) entered the gypsum industry for the first time when it acquired the assets and business of American in 1939, and became the assignee of its license. Neither of these companies had anything to do with the negotiations or execution of any of the licenses hereinbefore mentioned.

44. In the early 1930's, for the purpose of meeting competition from fiber insulation board, USG developed metallized gypsum board consisting of board with metallic foil. At varying times in 1934 and 1935, each of the licensees of USG, except Texas, signed a license agreement with USG which permitted it to manufacture and sell metallized board under USG's patent rights. Each of such license agreements was separately and independently negotiated by and between the licensor and licensee, and none of such agreements resulted from any agreement or understanding among the defendants or any of them. Each of such licensees accepted its license with the intention to manufac-

ture and sell metallized board under the metallized board licenses.

45. In order to meet the building code requirements found in many localities that a wall structure (the base plus applied coat of plaster) must stand a one-hour fire test, USG developed and had patented during the early 1930's a product called perforated gypsum lath which contained perforations of such size and spacing as to permit a wall structure composed thereof to withstand the one-hour test. When plaster is applied to this type of lath some of it passes through the perforations and forms a mechanical key, [fol. 72] which because of the size and spacing of the holes, supports the coat of plaster with the result that fire, under standard fire test requirements, may be withstood for an hour. USG's perforated lath was the first gypsum lath ever to pass that test. At various times during the years 1936-1939, USG granted licenses under the perforated lath patent to Certain-teed, American Ebsary, Kelley and Newark. The earlier of such licenses established minimum prices on perforated lath made and sold by such licensees and provided for the payments of small royalties for the use of the patent; the later licenses were royalty-free. Each of such licenses was independently and separately negotiated by and between the licensor and licensee, and none of such licenses resulted from any agreement or understanding among the defendants or any of them. Each of such license agreements was made in good faith by the parties thereto, and not with the understanding or belief on the part of either of such parties that the perforated lath patent was void.

46. The provisions in the license agreements whereby each licensee agreed to pay as royalty a stipulated percentage of the selling price of all board of every kind, whether or not it was made by patented processes or embodied product claims, were intended as compensation for the privilege of using any or all of the patents as well as a means of providing for the installment payment of damages for infringement for such of those licensees as had infringed the patents, and were insisted upon by the licensor to insure royalty payments due it under the licenses. Such provisions were not inserted in the licenses for the purpose of elimi-

[fol. 73] nating the production of unpatented board, nor did they have that effect.

47. The provision in the license agreements forbidding the transfer of the license by the licensee without the licensor's consent was not inserted for the purpose of insuring that the licenses should be industry-wide, but was inserted for the purpose of insuring that a licensee could not avoid the covenants of the license by the sale of its business or transfer of its license and to afford ordinary and customary protection to the licensor in the transfer of licenses under its patents.

48. The provisions in the license agreements to the effect that the licensee's books of account were open to the licensor, that the licensee was entitled to any more favorable terms granted to any other licensee, for cancellation and other related provisions, were not inserted in the licenses for the purpose of maintaining industry-wide license agreements but for the purpose of protecting the licensor, on the one hand, and the licensee, on the other, with respect to those matters and things common to entering into such contractual relations.

49. USG at all times involved in this suit was engaged in the manufacture and sale of its patented gypsum board and because it was deemed essential by it to do so provided in each of its issued patented licenses that it should have the right to fix the minimum price at which any licensee might sell the patented product. The provision that any minimum price established by the licensor should not be more than the price at which the licensor determined to sell the pat-[fol. 74] ented board to its own like trade in the same market was included solely for the purpose and with the effect of giving assurance that the right reserved by the licensor would not be used to establish a non-competitive minimum price for the licensee. Pursuant to this reservation minimum price bulletins were sent out by USG, as licensor, to its licensees except during the period from August 6, 1929, the date of the expiration of the Utzman Patent No. 1,034,746, to November 5, 1929, the effective date of the so-called November 1929 licenses, and except in the case of the licensee, Texas, during the period from August 6, 1929, to February 10, 1937, the date Texas' first license

agreement expired and it acquired a license in substantially the form of the so-called November 1929 licenses. Whether or not the licensor exercised its reserved right to establish minimum prices, and what those prices would be if the right were exercised, was at all times a matter for the sole determination of the licensor; and USG would not at any time discuss such matters with its licensees or prospective licensees or any of them.

50. Neither as a result of the license agreements nor bulletins nor otherwise were the prices of patented gypsum board at any time raised to arbitrary and non-competitive levels or established and maintained at unreasonably high levels.

51. All of the provisions of the price bulletins with respect to terms and conditions of sale had direct relation to the price for such products fixed by the licensor and were not promulgated for the purpose or with the effect of regimenting the industry, but solely for the purpose of defining [fol. 75] the minimum price fixed by the licensor in the license agreements, and providing for its maintenance on the patented board.

52. The so-called rebate provisions of the price bulletins were issued solely for the purpose of insuring maintenance by the licensees of the minimum price fixed by the licensor and protecting it against indirect reductions by means of secret rebates made for the purpose of reducing the price charged by such licensees below the minimum price, and not for the purpose or with the effect of controlling the prices charged by the licensees for unpatented products.

53. In 1932 USG set up as a department a wholly owned corporation called Board Survey Company. Its function was to receive complaints of license violations, to investigate the facts, call them to the attention of the licensee involved, and upon occasion to the attention of USG. The licensees had no part in the formation, management or operation of Board Survey Company, and its formation, management and operation by USG was not the result of any agreement or understanding among the defendants or any of them. The operations of Board Survey Company were confined to efforts to insure compliance with the licenses and price bulletins and were undertaken solely to protect the rights of USG under the license agreements and

patents and its activities were so limited. Board Survey was dissolved in 1937 and no other agency took its place.

54. Defendants did not by agreement or otherwise eliminate the production of open-edge board, and there was not any agreement or understanding among defendants or any of them that the production of such board should be dis- [fol. 76] continued. Defendants were free at all times to make and sell any type of gypsum board, including open-edge board. The discontinuance of the manufacture of open-edge board was entirely due to economic reasons.

55. Both seconds and No. 2 board were boards made under USG's patents. There was no agreement or understanding among the defendants as to the price to be fixed for the sale of such boards, nor was there any agreement or understanding that such boards would not be manufactured.

56. The license agreements were not executed with any intention to eliminate jobbers. There was no agreement or understanding among the defendants or any of them to eliminate jobbers.

57. The discontinuance of the jobbers' discount provided for in the price bulletins resulted solely from the exercise by USG of its right to establish a price for a patented product. USG did not have any agreement or understanding with the other defendants or any of them that such discount would be discontinued.

58. There was not any agreement or understanding among the defendants or any of them that prices of plaster or any other unpatented gypsum product would be raised, fixed or stabilized, nor did the defendants by any concert of action or otherwise raise, fix or stabilize any such prices.

59. Defendants' prices for plaster and other unpatented products have at all times been highly competitive, and were not in any way affected by the minimum prices established by the licensor for the patented board. The so-called rebate provisions of the price bulletins were not promulgated for the purpose, and did not have the effect of fixing [fol. 77] or stabilizing the prices of plaster or other unpatented products; nor did the defendants by complaints addressed to Board Survey Company or by any of its activities fix or stabilize prices of plaster or other unpatented products.

60. There was not any agreement or understanding of any kind between the licensor and any licensee by which any manufacturing distributor or other purchaser of board was required to adhere to any price or term or condition of sale upon the resale of any of the products bought from any of the defendants. There was not any agreement or understanding among the defendants, or any of them, that they would fix or control the resale prices charged by manufacturing distributors or other purchasers for products purchased from any of the defendants, nor did the defendants or any of them fix or control any such resale prices.

61. The principal patents of USG under which license agreements were issued were basic patents and of such scope as to have great commercial value. It was essential that each manufacturer of gypsum board should have the right to use said patents in order to be competitive with those who had such rights.

62. The license agreements hereinbefore referred to were negotiated at arms length and were bona fide agreements entered into in good faith and intended to bind each party thereto to the promises made therein. They were not sham agreements executed to effectuate any purpose or objective [fol. 78] not expressly set forth in the agreement.

June 15, 1948.

Respectfully submitted, Bruce Bromley, Murray W. McEniry, Hugh Lynch, Jr., Attorneys for United States Gypsum Company, Sewell L. Avery and Oliver M. Knode.

[fol. 79] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

OFFER OF PROOF BY THE DEFENDANT, THE CELOTEX CORPORATION—Filed June 15, 1948

The Celotex Corporation, pursuant to the request of the Court in this cause, advises the Court that upon hearing of this cause it intends to offer and will, if permitted, offer

in its defense competent evidence to prove the facts stated in its answer, including the following:

Celotex entered the gypsum industry for the first time in 1939, when it acquired the assets of The American Gypsum Company, in order to broaden the line of products which it could offer for sale in competition with other manufacturers in the building materials industry. In acquiring such assets, Celotex was required to take over the license between American and United States Gypsum Company which had been entered into by American many years before, on November 25, 1929.

By the terms of the license, American had agreed not to sell all of its assets without requiring the purchaser to assume all of the obligations of American under the license and to agree to be bound by all of the terms and conditions of the license, including the assumption of the claim which United States Gypsum Company had against American for damages for infringement of certain patents.

[fol. 80] In the nature of the case, Celotex had no part in the early negotiations with respect to this or any other license involved in this case. The observance by Celotex of any of the terms and provisions of the license, as charged in this case to have been unlawful or improper, was not the result of any voluntary act on the part of Celotex but constituted solely the observance of contractual relations and obligations which it inherited from American and which it was legally obligated to observe unless it sought to escape the observance thereof on the ground of the invalidity of the terms of the license. Upon Celotex becoming obligated to carry out the terms of the license, it was advised by counsel that the provisions of the license were valid and enforceable and that Celotex was legally obligated to observe the same.

During the sixteen months period to August 15, 1940, the date of the filing of the complaint in this cause, Celotex continued, in the bona fide belief that it was obligated legally so to do, to observe the terms of the license. Since July 8, 1941, when Celotex was advised that the Haggerty patent had expired, Celotex had not observed any price limitation under the license, and its observance of the terms of the license has been solely with respect to payments of the royalties payable thereunder in order to prevent the

cancellation of the license to use the patents thereunder which Celotex was advised and believed and still believes are valid.

For a concise statement of the state of the record with respect to Celotex, reference is made to the Supplemental Brief for Celotex filed in the Supreme Court of the United States in this case.

[fol. 81] Respectfully submitted, Walter G. Moyle, Ralph P. Wanlass, 1109 Warner Building, Washington 4, D. C., Attorneys for The Celotex Corporation.

Andrew J. Dallstream,
Norman Waite,
Fredric H. Stafford, 231 South LaSalle Street, Chicago 4, Illinois, of Counsel.

[fol. 82] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Holding a Three Judge Court

Civil Action No. 8017

UNITED STATES OF AMERICA, Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; Certain-teed Products Corporation; The Celotex Corporation; Ebsary Gypsum Company, Inc.; Newark Plaster Company; Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company; Sewell L. Avery; Oliver M. Knode; Melvin H. Baker; Henry J. Hartley, Frederick G. Ebsary; and Frederick Tomkins, Defendants.

Reporter's Transcript of Hearing on Motion for Summary Judgment—June 29, 1948

Court Room, U. S. Court of Appeals Building,
Washington, D. C.

Tuesday, June 29, 1948.

The above entitled cause came on for oral argument on Plaintiff's Motion for Summary Judgment and Defendants'

Offers of Proof at 10:00 o'clock a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

[fol. 83] APPEARANCES:

On behalf of the plaintiff:

Roscoe T. Steffen, Esq., and Edward Knuff, Esq., Special Assistants to the Attorney General.

On behalf of the defendants:

Bruce Bromley, Esq., Hugh Lynch, Jr., and Murray W. McEniry, Esq., for the defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode.

Nicholas J. Chase, Esq., for the defendants National Gypsum Company and Melvin H. Baker.

Charlton Ogburn, Esq., for the defendant Certain-teed Products Corporation.

Ralph P. Wanlass, Esq., for the defendant The Celotex Corporation.

James O'Donnell, Jr., Esq., for the defendants Newark Plaster Company and Frederick Tomkins.

D. I. Johnston, Esq., for the defendant Samuel M. Gloyd, doing business under the trade name of Texas Cement Plaster Company.

[fols. 84-86] PROCEEDINGS

* * * * * * *

[fol. 87] COLLOQUY BETWEEN COURT AND COUNSEL

Chief Justice Stephens: Now, gentlemen, how much time do you wish to argue this motion for summary judgment and this proffer?

Mr. Steffen: I should think your Honor, in view of the [fol. 88] day, it would be a little slow, maybe an hour or an hour and a half.

Chief Justice Stephens: I think we have all read the briefs of the Government. We haven't had time to read the defendants' briefs as they were just presented. They are not extensive.

Suppose we set an hour and a half on a side tentatively, gentlemen. However, we will not restrict you too seriously as to time.

Will you proceed, Mr. Steffen, taking such time for opening as you wish and leaving such time for closing as you wish.

Mr. Justice Jackson inquires whether or not the offer of proof was formally filed in the clerk's office.

Mr. Bromley: Yes, your Honor.

Chief Justice Stephens: Was the Celotex offer formally filed? Have you gentlemen examined into that? That is correct, is it not, Mr. Watts?

The Clerk: I have just received the defendants' offer of proof from the Gypsum Company. Ebsary filed several days ago.

Chief Justice Stephens: Who filed several days ago?

The Clerk: Ebsary.

Chief Justice Stephens: I haven't seen that. I have had handed to me only Celotex and the defendants' offer, not Ebsary's. The clerk's office should furnish that to the [fol. 89] judges immediately when it is received.

Mr. Steffen: We have not seen it either, your Honor.

Chief Justice Stephens: You should furnish the Government, if you have extra copies, and each of the judges, the Ebsary offer of proof. When were they received?

The Clerk: I guess it is Celotex I had in mind, Judge.

Mr. Chase: If your Honors please, as local counsel for National Gypsum Company, I want to advise the Court that Mr. Finck is unable to be here today and expresses his regrets.

In connection with the motion for summary judgment, which is before the Court, National Gypsum Company joins in opposition to the granting of that motion.

With respect to the proffer of proof, the National Gypsum Company wishes to stand on its answer as drawn, reserving such right as it may have to offer proof in the event there is a resumption of trial.

Chief Justice Stephens: Very well. Anything else preliminary?

Mr. O'Donnell: If your Honor please, in behalf of the individual defendant, Mr. Frederick Tomkins, and the Newark Plaster Company, we wish also to join at this time

in the defendants' opposition to motion for summary judgment and also to join with the defendants' offer of proof.

Mr. Bromley: May it please the Court, I think perhaps I should call your Honors' attention to the fact that the [fol. 90] offer of proof as filed is signed only by counsel of United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, and, as I understand it, other counsel are orally going to state whether they adopt it as theirs or not.

Judge Garrett: There was a letter accompanying it, I think.

Mr. Bromley: Yes, your Honor.

Chief Justice Stephens: Are each of the defendants represented this morning?

United States Gypsum Company is.

Is Certain-teed represented?

Mr. Ogburn: Yes, your Honor.

Chief Justice Stephens: You represent Certain-teed?

What is your position?

Mr. Ogburn: We join in this proffer of proof.

Chief Justice Stephens: Made by the defendants U. S. Gypsum Company, et al.; and you also resist the motion for summary judgment?

Mr. Ogburn: Yes, sir.

Chief Justice Stephens: And who represents Celotex?

Mr. Vanlass: If your Honor please, The Celotex Corporation joins in the opposition to the motion for summary judgment and adopts the general proffer of proof on behalf of defendants, which we have supplemented by an individual proffer on behalf of Celotex.

[fol. 91] Chief Justice Stephens: Ebsary?

Is Ebsary represented?

(No response.)

Mr. Knuff: They don't have local counsel.

Chief Justice Stephens: J. S. Rippey, Frederick G. Ebsary. They are not present this morning?

Mr. Bromley: He is not here, sir.

Chief Justice Stephens: Newark?

Mr. O'Donnell: Your Honor, I made a statement on behalf of Newark.

Chief Justice Stephens: Oh, yes.

Mr. Johnston, we note your presence.

Mr. Johnston: If Your Honors please, we join U. S. Gypsum in resisting the motion and join in the offer of proof.

Chief Justice Stephens: The individual defendant Avery is represented, of course. Oliver K. Knode; Melvin H. Baker, he was also United States Gypsum Company, was he not?

Mr. Bromley: Mr. Baker was National.

Chief Justice Stephens: National.

The statement has just been made for National.

Mr. Bromley: Yes, sir.

Chief Justice Stephens: Dahlberg is out of the case.

Hartley. Who represents Hartley individually?

Mr. Ogburn: Hartley was represented, your Honor, by Mr. Adams. He has not been an officer for many, many years, I think, of Certain-teed. I don't know whether Mr. [fol. 92] Adams still represents them or not.

Chief Justice Stephens: And Frederick G. Ebsary is absent.

Who represents the individual Frederick Tomkins?

Mr. O'Donnell: I do, your Honor.

Chief Justice Stephens: You may proceed, Mr. Steffen.

Opening Argument on Behalf of the Plaintiff

By Mr. Steffen:

Mr. Steffen: This is an argument, your Honor, upon the plaintiff's motion for summary judgment, which was duly filed on the 15th day of the month in accordance with the Court's direction.

Upon such an argument we assume that the rule as stated in the Miller case in this jurisdiction would apply in determining what is necessary to make out a defense under summary judgment, and that is that summary judgment will be granted only when it appears that there is no genuine issue as to any material fact.

The citation on page 23 is probably as good a citation or as good a statement of the rule as you will find. There the court says:

> "It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable

[fol. 93] minds, or that conceding its truth, it is without legal probative force."

It will be our purpose to examine the defendant's proffer of proof in this case in the light of that statement, and I think we may show your Honors either that the evidence is too incredible to be believed or—and this is by all odds the largest category—that conceding its truth, it is without legal probative force.

Chief Justice Stephens: What page did you say that is?

Mr. Steffen: That is on page 23 of the Government's brief, and that, I think, is court statement as to the purport of Rule 56 of the Federal Rules under which we are proceeding with our motion for summary judgment.

That brings me to the substantive argument.

If your Honors please, I should like to argue first the law of the case as we see it, and secondly, to take up each of the offers of proof that the defendants have made and to determine whether they fit or don't fit into this picture.

Now, the law of the case, as we said last June 8, informally, I think has been said by the United States Supreme Court in its statements in the Gypsum case, and in particular I want to refer your Honors to the language on pages 34 and 35 of the slip opinion.

[fol. 94] I call your Honors' attention particularly to the language at the top of page 35, about 5 lines down.

Chief Justice Stephens: Of the Supreme Court opinion?

Mr. Steffen: Of the slip opinion, yes, your Honor.

It says:

> "Even in the absence of the specific abuses in this case, which fall within the traditional prohibitions of the Sherman Act, it would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices."

That, we take it, is perhaps the best summary in the opinion of the law of the case and it, if I may so state, seems to us to say substantially what we argued when the case was here before.

We take that to say that if we can show that the defendants, constituting all former competitors, in an entire industry, acted under patent licenses to organize the industry and stabilize prices, that the combination is unlawful.

[fol. 95] Now, the first argument that would meet that point is that the General Electric case give protection to the defendants for what they have done, and we have, in our brief, taken that up on page 24. I would refer your Honors particularly now to the language of Mr. Justice Reed on page 34 at the foot of the page. He says:

> "The General Electric case affords no cloak for the course of conduct revealed in the voluminous record in this case."

Then, this next language is important:

> "That case gives no support for a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized."

Then, to carry on, the last sentence on page 35 seems to us to hit the other idea expressed in the General Electric case. That is, that price control would be permitted where it was normally and reasonably adapted to secure pecuniary reward to the patentee for his patent.

The language here is just as cold as it can be, and it says:

> [fol. 96] "The rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly."

That states our basic proposition, that what we have to establish here beyond any reasonable doubt, or, at least without any genuine issue as to a material fact, is that there was a combination of erstwhile competitors throughout the gypsum industry; that they did fix prices.

I think for purposes of present argument, although we do not waive the point, that many of the abuses such as the court refers to in this portion of its opinion, such as controlling plaster prices, perhaps controlling manufacturing distributors, fixing the size of truckloads, the amount of dunnage, eliminating jobbers—all of those abuses, if proven to have been done by concerted action would normally constitute a violation of the Sherman Act, can for purposes of this argument be laid to one side, and we can look simply to whether or not the defendants combined under patent licenses, being erstwhile competitors covering an entire industry, and fixed prices.

Judge Garrett: The Supreme Court said that, did it?

Mr. Steffen: That is as I read it, your Honor.

Judge Garrett: In other words, all of these matters of dunnage and freights, and all of that, are not necessary to the broad decision that the court was making. Is that the [fol. 97] way you interpret it?

Mr. Steffen: I would say this: For purposes of a motion for summary judgment and for purposes of the Supreme Court's opinion, it isn't essential to show all of those violations. If you have shown price control alone, you have a case.

Our purpose, therefore, is to clear this as nearly as we can to the essential point in issue—which we think is not in issue, and ask your Honors for summary judgment on that basis.

Then, when it comes to the matter of formulating the decree, if you should give us summary judgment, then many of these matters will come up. I think you will find that most of them will be rather easily handled upon the decree. But for purposes of judgment, either for violation of section 1—that is, if there is a violation of section 1, combination in restraint of trade—we can center this argument on price. They did fix prices. There is no question on the Supreme Court decision that if you did establish price control, that it is per se unlawful. We would like for purposes of this argument to center on that one point.

Secondly, as you have noted in our third point of our brief, if you find an industry under the control of a group who have the power either to exclude competitors or to charge

monopoly prices, you have a monopoly. That would be a violation of section 2. I will take that up when I come to it, [fol. 98] but I want to get clear that we are moving now on both section 1 and section 2. One is a conspiracy or combination in restraint of trade, and the other is a monopoly which is tested by whether they have the power to exclude competitors or to fix monopoly prices.

Now, we have cited here in the footnote on page 24 the colloquy that took place between Mr. Bromley on the one hand and Justice Frankfurter on the other in the Supreme Court argument, which I think is rather illuminating. They got to the question there of whether a plurality of licenses might be a legitimate exercise of the right of a patent holder. If you read the discussion, it comes down to Mr. Justice Frankfurter's statement that:

> "I do not think logic, abstract logic is going to solve this kind of a problem."

In other words, as we read the Supreme Court's holding, which was unanimous, they looked at the substance of the thing. They see here what is admitted in this case without any question, they see here a combination of all of the gypsum manufacturers in the country East of the Rocky Mountains, they see that since November, 1929, they have fixed prices without any question at all, that they have done a number of other things such as I have read from Mr. Justice Reed's opinion: the complete regimentation of the industry, the production of competitive unpatented products [fol. 99] suppressed, a class of distributors squeezed out and numerous other things, and you see, therefore, the fact that what you have here is a group of people in charge of an industry who have for nearly 20 years or at least since November, 1929, had absolute control of an industry.

That is substantial, and what they are looking at is really what the Sherman Act is directed to prevent. They want to get rid of combinations which do control and restrain commerce. So my first point, therefore, is that what we have to show is a combination of erstwhile competitors in charge of an industry who have used the patent license agreement for purposes of fixing prices.

My sub-point is that the General Electric case gives no

support for that form of organization. In other words, we can for purposes of further discussion lay the General Electric case to one side. It has no application to the facts of this case.

Another point which we make—Perhaps I should make that point a little more clear because we have to get rid of that. If you will note on page 26, I refer to what took place in the opinion of the court in the Line Material case.

Chief Justice Stephens: Page 26 of your brief?

Mr. Steffen: Yes, your Honor.

In the Line Material case, they referred to their decision, [fol. 100] and the court there says in effect, (Mr. Justice Reed speaking), that the court is divided on whether the General Electric case should be overruled or not and that it would be unwise for him to state very broadly what it now stands for, but he says that it, at least, continues as a precedent—continues in a precedent—in a situation where a conspiracy to restrain trade or an effort to monopolize is not involved. He goes on to say:

> ". . . . . a patentee may license another to make and vend the patented device with a provision that the licensee's sale price shall be fixed."

In other words, as we read Mr. Justice Reed's language in the Line Material case, he very explicitly says that the G.E. case must be limited to practically the situation between licensor and licensee and that where there is no charge of a combination in restraint of trade or no charge of a monopoly—beyond that, he says it isn't a precedent.

Judge Garrett: Mr. Justice Douglas, I believe it was, put in a pretty strong concurring opinion there.

Mr. Steffen: Yes, your Honor.

Judge Garrett: In which I believe he used the expression "I would have done with the General Electric case".

Mr. Steffen: Yes.

Judge Jackson: That would clear a good deal of the [fol. 101] atmosphere if they had done it, too.

Mr. Steffen: We wouldn't have to argue so much. I think you can treat it as substantially done. As you perceive they haven't overruled it, but what they have said is that it is on a very, very limited footing.

I want to refer, while we have this up, to the Paramount case. In the Paramount case, which was decided after both the Line Material and the Gypsum case, the same thing came up. The charge there in the Paramount case was that there was a combination among the producers of films, and they made the contention that they had a copyright and that, having a copyright, they could therefore fix prices. These would be admission prices to theatres, using the General Electric case as their authority.

Over here on page 39 of our brief, I quote from the Paramount case, and there the court says:

> "We start, of course, from the premise that so far as the Sherman Act is concerned, a price fixing combination is illegal per se. We recently held in United States v. United States Gypsum Company"—referring now to this case—"that even patentees could not regiment an entire industry by licenses containing price-fixing agreements."

That is what the court says in the Paramount case, "that even patentees could not regiment an entire industry by [fol. 102] licenses containing price fixing agreements."

Now, that is pretty explicit language.

To continue:

> "What was said there is adequate to bar defendants, through their horizontal conspiracy, from fixing prices for the exhibition of films in the movie industry. Certainly the rights of the copyright owner are no greater than those of the patentee."

Then, he goes on a little later in the opinion:

> "We stated in United States v. United States Gypsum Company that 'The rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly.' "

That is that same sentence, and it says that if you find a situation where they have fixed prices throughout an

industry, and, of course, regimented it in all other respects such as fixing truckloads and delivery areas and all the rest of the things, that the rewards you get are not normally and reasonably adapted.

I might say to your Honors that in our brief before the Supreme Court we listed each of those items and asked the Court to tell us whether this, that, or the other was normally and reasonably adapted. This sentence just says that none of them are, that where you have an entire [fol. 103] industry together, that the awards are not normally and reasonably adapted, without getting down to where this, that, or the other thing might have been reasonable under some circumstances.

Now, the opinion continues:

> "The same is true of the awards of the copyright owners and their licensees in the present case. For here too the licenses are but a part of the general plan to suppress competition."

Note that language.

> "The case where a distributor fixes admission prices to be charged by a single independent exhibitor, no other licensees or exhibitors being in contemplation, seems to be wholly academic. . . ."

Those were the words, by the way, of Judge Hand in the lower court when he was distinguishing the General Electric case. He said the General Electric case applied in his opinion only to the transaction between licensor and licensee and that where you have an industry-wide agreement it does not apply. Here is the Supreme Court saying that that sisuation is wholly academic, and it certainly is on the facts of this case for the reason that we have here admittedly all of the manufacturers of gypsum board in the area East of the Rocky Mountains, so that there is no question that this is much beyond a single licensor or single licensee thing. This is a case where we charged [fol. 104] a combination throughout, and there, as Mr. Justice Reed says, the G.E. case doesn't apply, doesn't

continue as a precedent where you have charged a conspiracy or monopoly throughout an industry.

Well, now, if that will dispose of the General Electric case, we are then thrown back simply to the question of whether these defendants had associated together as a combination, whether they were erstwhile competitors, whether they have fixed prices, and whether that is so clear in the record that there is no genuine issue as to any material fact.

It is my purpose now to look to see whether we have those elements so clearly in the record that there is really no issue as to any material fact.

On page 27 we itemize most of the things that are admitted which are essential. There is no question in the case but what we have all the manufacturers in the area covered. There is no question in the case that they were former competitors. In fact, the record is clear, and I think the defendants offered to prove again, that there was a price war prior to the license agreements in 1929. So that, there was competition; we have all the manufacturers, and they were all the former competitors, and there is no question that they all took out licenses and there is no question whatever but what every license from first to last, as Mr. Bromley told the court, contained a price fixing agreement. Mr. Avery was very insistent upon [fol. 105] that. There is no question, furthermore, but that they did fix prices.

If you will note, Mr. Bromley in his opening statement, as we quote on page 27 here, said:

> "We don't take the position that we didn't fix prices. Of course we did, we fixed prices of our competitors."

That is clear. So what have you got?

You have got a combination of all competitors in an industry covering the whole area, and you have got them fixing prices.

As I say, laying aside for one moment the matter of all the other abuses, price fixing is, after all, the chief vice that the court has been inveighing against for the last several years.

Now, the question next then is to see whether the defendants have acted in concert and the question next beyond that is to determine the point of time at which they acted in concert. We have to show that the defendants, acting in concert, acted to restrain commerce in the area East of the Rocky Mountains.

Now, on page 29 we set out the test, the test of when you have a conspiracy or when there is concerted action. That is probably best shown in the Interstate Circuit case and the Masonite cases. They are referred to consistently by the Supreme Court in all their later opinions, and they [fol. 106] are no way shaken as authorities.

Therefore, I would read you what the court said, reading there in the middle of page 29 of our brief:

> "Acceptance by competitors, without previous agreement, of any invitation to participate in a plan, the necessary consequences of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

Chief Justice Stephens: Let me have that again.

Mr. Steffen: Page, 29, the last part of the middle paragraph.

Chief Justice Stephens: Beginning, "Acceptances by competitors"?

Mr. Steffen: Yes, your Honor.

Judge Jackson: It might be said then that "by their fruits ye shall know them."

Mr. Steffen: Yes, your Honor, decidedly so.

I am getting now, your Honors, to the point we reached in our discussion or hearing on June 8, in which Mr. Bromley said that his position constitutes a very fine line. As I understand his position as then stated, it was that although we could show all of these other things, unless we could show that they not only intended but actually understood and agreed in advance of signing the licenses that they were going to do the various things such as price fixing, eliminating jobbers, and so on, that we couldn't [fol. 107] have made a case. I am reading now from the test as laid down by the Supreme Court as to when you have a conspiracy. I want to make it so very clear that

you don't have to have a preliminary agreement. As Mr. Justice Jackson says, you know them by their fruits, and if you find them in a combination and if you find them actually fixing prices and it covers an entire industry and they were former competitors and even though they have used the patent licenses which would normally be a lawful step, if you find them in a combination, that is unlawful.

The point of time in which the industry must have given its adherence to that way of doing business or that plan, or scheme, or whatever you wish to call it, is not material. In order to violate the Sherman Act, you don't have to sit down first and say, "Now, we are going to take out a license to do this and fix prices." If you do fix prices, then the court is not going to listen when you say, "Ah, but we didn't intend to do that. All we did was murder the man—we didn't intend to do it."

Let's take a look again at that statement:

> "Acceptance by competitors"—these are clearly competitors—"without previous agreement"—that practically answers the question of whether or not we have a previous agreement—"of an invitation to participate in a plan"—and the plan, as we stated [fol. 108] here, is what they did, that they organized and regimented the industry—"the necessary consequences of which, if carried out, is restraint of interstate commerce"—and here they have carried it out and they have fixed prices ("of course we have fixed prices", as Mr. Bromley says)—"is sufficient to establish an unlawful conspiracy under the Sherman Act."

It will be noted that in the Interstate Circuit case the court did not specify that the adherence to the plan must be at any given time. Now, to make this very tight, look at what they did in the Masonite case. In the Masonite case, and I will quote from the excerpt on the lower part of the page, the lower court found expressly that:

> ". . . in negotiating and entering into the first agreements, each appellee, other than Masonite, acted independently of the others,"—

You see, the Masonite case was very similar to this case. In that case, Masonite had a patent, and Masonite entered

into a series of contracts with other manufacturers and these contracts gave those manufacturers del credere agencies to sell the patented article. Each of those contracts was lawful, looked at alone. The question was: Well, when did they first learn that they were in this agreement whereby the whole hardboard industry was stabilized?
[fol. 109] The lower court found that they acted independently, that Masonite licensed one and then they licensed another.

—"negotiated only with Masonite,"—

that is much different from this case, each of the licensees negotiated directly and solely with Masonite, that they

—"desired the agreement regardless of the action that might be taken by any of the others,"—

that is, we have some testimony here that they wanted the U.S.G. patents even though nobody else took out licenses, and the court says that:

—"regardless of the action that might be taken by any of the others,"—

and in this case we have a most favored nation clause in the license agreements where they did require in effect that if you do license anybody else, it must be on the same terms—

—"did not require as a condition of its acceptance that Masonite make such an agreement with any of the others, and had no discussions with any of the others."

[fol. 110] This case is just full of discussions on the part of all licensees at various meetings, and it is in the record admitted that there were meetings all during the summer of 1929, a meeting in May, May 23rd, and many meetings subsequently are admitted, and here the lower court found there were no discussions. Now, look at what the Supreme Court did with that. It says:

"It is not clear at which precise point of time each appellee became aware of the fact that its contract

was not an isolated transaction but part of a larger arrangement. But it is clear that, as the arrangement continued, each became familiar with its purpose and scope. Here, as in Interstate Circuit, . . . 'It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it.' The circumstances surrounding the making of the 1936 agreements and the joinder in 1937 of the two other companies leave no room for doubt that all had an awareness of the general scope and purpose of the undertaking. As this Court stated in the Interstate Circuit case: 'It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspira- [fol. 111] tors . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.' "

Judge Garrett: May I ask you there about your interpretation of that last paragraph beginning with "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action"? I suppose there must have been conspiracy between at least two individuals.

Mr. Steffen: Yes, your Honor.

Judge Garrett: And then if others entered thereafter under the same terms, it would make them conspirators? How do you understand that language?

Mr. Steffen: I read it in the context of the case, and in the context of the case you have Masonite with a patent, and you have the different manufacturers of cardboard with competitors and Masonite said to Manufacturer A, "We will make you a del credere agency and let you sell."

Then Masonite said to B, we will make you a del credere agent, and then they said to C the same thing, and then they woke up one time with all of them aware, as the court says, of the fact that they were in a plan whereby Masonite was fixing prices throughout the industry.

[fol. 112] The court said it doesn't make any difference whether they have preliminary conversations or whether they acted independently if at some time they all said, "Well, here we are; we are now fixing prices throughout the industry; we are now in a combination or conspiracy."

So the point I make is that it isn't that you have to have a pre-concert or agreement sometime before you enter the agreement, it is what you are going to do if you all get in together and are restraining commerce and trade without any patent protection, as in this case, and thereby having an illegal and unlawful combination and conspiracy.

Judge Garrett: I am thinking particularly of the meaning of the word "conspiracy" as it is used in the Act.

Mr. Steffen: These are the two cases that construe it most authoritatively, I believe, and they say that for purposes of showing conspiracy all you have to show is adherence to a common plan, a common course of dealing or course of action with knowledge that the others are doing the same thing. When you get all the manufacturers together, each of them knowing that the other is guiding his business according to the same plan—or, in other words, in this case they are all fixing prices as U.S.G. lays them down—you have a combination or conspiracy, which this case holds is unlawful.

The point I want to make is it doesn't make any difference when that comes, whether before they took out those [fol. 113] licenses or agreements they intended to do this, or whether they first become aware as the plan progresses, and when they do so become aware, from then on you have concerted action, which is what the Sherman Act is directed against, concerted action on the part of erstwhile competitors according to a common plan or course of dealing, the necessary effect of which is to restrain commerce.

Practically everything in that formula is, I think, in this case clear beyond any doubt. These two decisions state the law of the case, I think, without any doubt at all.

Is that clear, your Honor?

Judge Garrett: Yes, I understand your position.

Mr. Steffen: Well, the point that I should talk to is whether or not these defendants at any time learned that there were other defendants in the industry all guiding themselves by the U.S.G. bulletins.

In other words, when do we find concerted action for the purpose of restraining commerce or fixing prices?

That, I think, is clear without any question at all.

One of the points that we refer your Honors to on page 30 is the policing matter. U.S.G., as you will recall, formed Board Survey to police licensees, and Mr. Bromley, I think, stated in his opening statement that:

> "Of course, it was policing, of course it was trying to keep the licensees in line, but trying to keep them in [fol. 114] line only under the licenses . . ."

We take that as more or less a complete admission that all the licensees were taking part in the policing. They knew that others were associated with them and that the purpose was either to carry out the licenses or really to fix prices and restrain commerce.

Then, we have in this meeting of October 17, 1932, you will recall Mr. Lenci's testimony here in which he quoted Mr. MacLeish that,

> "if the situation did not improve there were only three things to do, either cancel the licenses; or for U.S.G. to institute damage suits against the licensees; or to eliminate the price control feature from the licenses."

Now, at the conclusion of that day's testimony, there was a colloquy between Justice Stephens and Mr. Bromley in which is it pretty clear—this is on page 31 of our brief—in which it is pretty clear that Mr. Bromley agrees that did take place, that all of the licensees with the licensor were present, they went over the matter of whether they were or were not going to have price control, and they decided in effect that they would have price control because price control continued on afterward. There is no question but what it did continue on after.

There we would say if all other evidence failed, there [fol. 115] would be a point of time when the entire industry in the language of the Supreme Court "became familiar with the purpose and scope of the plan." I am reading from the court's opinion in the Masonite case, but it is clear, as the court there said:

"that as the arrangement continued, each became familiar with its purpose and scope."

We have agreed that the purpose and scope was to fix prices throughout the industry and that they had no exemption by virtue of the General Electric case. There you have all the manufacturers of gypsum board in the United States East of the Rocky Mountains familiar with the purpose and scope of the plan to fix prices. In fact, they had an opportunity to get out at that time because U.S.G. said "Go along or we will sue you or cancel the agreement," and they chose to go along.

There you have a clear case of concerted action on the part of all erstwhile competitors to fix prices throughout the industry.

Now, we also have in the meeting of May 23, 1929—that was the Chicago meeting at the Palmer House where Mr. Avery admittedly said to his licensees:

"We have a 'foam' application, and we would like to license you."

He offered at that time to license the industry. There is no question but what that was true. The defendants in their proffer offer to prove it again.

[fol. 116] On page 12 of their proffer, item 31 says:

"On May 23, 1929, U.S.G. disclosed to its licensees the existence of the new 'bubble' invention, which was a method of making a lighter and cheaper gypsum board by introducing soap foam in place of sawdust, for which an application for letters patent had been filed. . . . U.S.G. offered a license under the new 'bubble' invention to any of its licensees who might be interested in taking it."

Over in the Supreme Court, Mr. Justice Black asked Mr. Bromley:

"What happened after the expiration of the patent?"

Mr. Bromley answers:

> "After the expiration of the patent, Mr. Avery called these licensees together and said, 'Now, I have an entirely new development, the Roos foam or bubble board invention. I want you to look at it. I offer it to you. You can have it if you want it.' "

That statement makes it clear, I should hope, beyond any question at all for purposes of this case, that Mr. Avery got all his licensees together and he offered them a license under the "foam" application.

Of course, as you know, those licenses were subsequently signed, in November of 1929, and you know from Mr. [fol. 117] Bromley's admission throughout this case, that those licenses provided for price control because Mr. Avery insisted from first to last that there must be price control.

So, without laboring the argument any further, it would seem that we have a clear-cut case of these defendants going into a plan, these defendants, being erstwhile competitors, going into a plan to license the entire industry to fix prices and each knowing that the others were going into the plan —it is not necessary that there be an agreement to go into the plan. If "A" sees "B" going in, "B" sees "C" going in and "C" sees "D" going in, and they all go in knowing the others are going in, you have a combination or conspiracy. You don't have to say, "Let's sit down and agree that we are going to do what we do." Nor do you have to show intent; you don't have to show that they intended to do what they did.

Judge Jackson: They evidently relied upon the General Electric case when all this was done.

Mr. Steffen: Yes, and that accounts for most of the things they did.

Judge Jackson: That is very obvious, I think.

Mr. Steffen: Let me buttress this argument a little bit better. On page 32 we have a colloquy between Mr. Bromley and Mr. Justice Reed before the Supreme Court, and I read this to mean Mr. Justice Reed was putting his figure on this very question we are talking about here. He wanted

[fol. 118] to know when did these people get together, according to the record. The following colloquy occurred:

"Justice Reed: What I am interested in knowing is whether the licensee, the middle licensee, with Blagden on one side and the last licensee on the other, knew of the other licensees?"

He wanted to find out what did they know.
To continue:

"Mr. Bromley: I think all, of course, as they took licenses, knew of the existing licenses.

"Justice Reed: Was there any provision that this was a standard license, or were there more favorable terms?

"Mr. Bromley: Yes, sir, there was a most favored nation clause.

"Justice Reed: Do you recall what that is or where that is?

"Mr. Bromley: They can find it in a minute . . .

"Justice Reed: Also if there is such favored nation clause, each of them must know that it is participating in the general plan.

"Mr. Bromley: Yes, sir. . . ."

Now, if I stop there, that is the complete admission on the part of Mr. Bromley, as I see it, before the Supreme Court, that they did know that they were participating in a [fol. 119] general plan before they signed the licenses, which established that they probably knew it—they definitely knew it even after they signed the license—but here is a flat admission that they knew it even before they signed the licenses.

[fol. 120] Now, Mr. Bromley's argument carries on:

"but if the end result is legal how can their knowledge render it illegal in the end result; even with a multiplicity of licenses it is legal, and I do not understand that there is anything in Masonite which is contrary because the agreements in Masonite, contrary to the agreements here, were unlawful."

Now, Mr. Bromley is making a legal argument there to the Supreme Court. He admitted the proposition, first,

that they did know that they were going into the licenses. He is now trying to say that although they knew that, that that was perfectly lawful. That was his opinion. The Supreme Court held it was not perfectly lawful and that the General Electric case did not apply.

Therefore, his argument on the law can't stand up in view of the Supreme Court's opinion.

I want to make one more point. He says:

> "As I understand the Masonite agreements were unlawful and that that distinguishes the Masonite situation from this situation."

The Masonite licenses or agreements between Masonite and each of the other manufacturers created a del credere relation between Masonite and the other manufacturers, and the Supreme Court, Mr. Justice Douglas writing that opinion, said:

> "We assume those agreements are lawful."

[fol. 121] In other words, each of the agreements between Masonite and each of the others were lawful agreements, and that the difficulty there, as here, was that the sum total of the thing was unlawful. It was the concerted action using lawful license agreements, in this case, and using lawful del credere agency agreements in that case, to build up a combination or concert which had the effect of restraining trade.

Chief Justice Stephens: This question is perhaps academic now, perhaps it is a mere matter of intellectual curiosity to ask it, although perhaps it might serve to illuminate the question which you commented upon:

I thought in the Masonite case (reading from page 4123 of the transcript of record):

> "The Court, treating the 'agencies' for the purpose of the decision as bona fide del credere agencies, nevertheless held that the form in which the parties chose to cast the transaction was not to govern and that the 'agency' arrangements in reality presented a Bloomer vs. McQuewan, Adams vs. Burke, Hobbie vs. Jennison pattern wherein when a patented product 'passes to the hands of the purchaser, it is no longer within the

limits of the monopoly. It passes outside of it, and it is no longer under the protection of the Act of Congress.' ''

I thought, therefore, that on the whole of the Masonite [fol. 122] case, as we said in our opinion in the topic in which we discussed the authorities, that while it is true Mr. Justice Douglas said he would assume the legality of the del credere arrangement, ultimately on the whole of the opinion he didn't and couldn't have meant that because he said that you had an Adams vs. Burke, Hobbie vs. Jennison, Bloomer vs. McQuewan situation; and that is the situation wherein the title to the patented product having passed to a purchaser rather than an agent, the control over it and over pricing it and over its distribution is lost to the patentee.

It was ultimately held in the Masonite case that you did have a situation where, in respect to each of the assumed del credere agents, there was an actual passing of title to the patented product, so that there really wasn't a del credere agency relationship. There were no agency relationships at all. There was the relation of purchaser and seller.

If that is so, it puzzles me greatly to understand the opinion of the Supreme Court—and perhaps, as I say this is acadamic, but perhaps it might help to eliminate the argument. If that is so, I am still puzzled as to what the Supreme Court means—and we have to try to find out what it means to reach a decision on this motion—if it holds that:

> The General Electric case will permit a single patent license with a price-fixing provision, but no more. Be- [fol. 123] cause a single patent licensing agreement with a price-fixing provision involves all the elements of action in concert which are involved when you have more than one. It involves necessarily a discussion of the terms and an agreement upon the terms and an agreement to fix prices by both the patentee and the licensee.

Aren't you, therefore, really forced into the position that the General Electric case is overruled?

Mr. Steffen: Your Honor, we would be very glad to take that position. I think logically you are right, and I think logically what a supreme court may do some day is to say it is overruled, but right now we are in that intermediate position which isn't entirely logical, as your Honor quite properly pointed out, where it continues as a precedent only in the single licensee-licensor situation.

Where there is a charge of conspiracy and particularly where it gets to the point of an industry-wide license agreement, where the court says flatly that the rewards go beyond anything that the patentee is entitled to normally and reasonably, then the G.E. case doesn't apply; but we would be very glad to take the position that even as between licensor and licensee where there is price control, that it should be deemed to be overruled. But it hasn't been so overruled yet.

Now, I make one other argument.

Chief Justice Stephens: You have quite a little time.

[fol. 124] You started at 10:25, and it is now 11:15. Therefore, you have ten minutes of your first hour, and you are allowed an hour and a half. We will not be too strict in any event. We want to hear you, all parties, fully.

Mr. Steffen: I would like to make the argument now, which is Argument E on page 36.

Chief Justice Stephens: Since I have interrupted you, you might clear up another point in my mind.

What do you mean when you say that if the Court should reach the conclusion which you urge it to reach,—that there was action in concert, admittedly under the pleadings and statements and admissions of counsel, to enter into this group of licenses for the purpose of stabilizing prices—that the other issues in the case (by which I assume you refer to the agreement to fix prices at high and arbitrary levels, the agreement to fix prices on unpatented materials, the agreement to eliminate jobbers, the agreement to eliminate unpatented open-edged board, and the agreement to fix the resale price of manufacturing distributors as charged) can easily be taken care of in a decree?

How can we take care of those issues in a decree unless

we reach also the conclusion—I mean without a hearing on those issues—unless we reach also the conclusion that under the Supreme Court opinion the Supreme Court has said that no evidence will overthrow anything which the [fol. 125] Government has shown with respect to those issues?

Mr. Steffen: My position on that, Your Honor, is that for purposes of this argument the center of the thing is price control. If the Court should give judgment for us in general—that is, judgment under Section 1, based upon a showing without any dispute as to price control—then you come to the matter of a decree and you enter a decree, let us assume, forbidding any price control.

The result of that would be substantially to avoid the jobber situation. We would expect, however, probably also a decree saying that the defendants shall not concertedly refuse to sell to jobbers at any specified price. Now, when we come to that point I don't think Mr. Bromley will raise much of an argument because there isn't any question but what jobbers are out and what we are asking is that they shall refrain from concertedly refusing to sell to jobbers at anything other than the dealer price, leaving it open to any manufacturer to do just as he sees fit.

I should think he would be willing to consent to such a provision in the ultimate decree. Therefore, it isn't essential that we get into a long dispute and a lot of evidence on whether they have or haven't been eliminated. There is enough showing, certainly, that they have been eliminated to justify the Court in enforcing its decree based upon price control along to say, "and, moreover, [fol. 126] you should not gang up against the jobbers"—just to implement the broader decree.

This point "E", Your Honor, if I may refer to that, gives another argument why the Line Material case is not only not an authority against the Gypsum case—in other words, it didn't overrule the Gypsum case—but I think it brings out into the open another set of facts which distinguishes this case from the General Electric case and which would, therefore, again justify the Court, finding all of the other necessary elements, to give judgment for the plaintiff.

I don't know that I need in my time to stress that. It is fairly well developed in the brief.

Chief Justice Stephens: Where does your point "E" start?

Mr. Steffen: It starts on page 36 and continues on for two and a half pages to 38.

Chief Justice Stephens: Oh, yes.

Mr. Steffen: Briefly what the court had in the Line Material case was two patents, a dominant and a subservient patent. There were two manufacturers in the case to start with. The Southern people owned the Lemmon patent, which is the dominant patent on the drop-out fuse, and the Line Material people owned the subservient Schultz patent, which was also on the drop-out fuse. Obviously, neither could sell—of course, the dominant patented article [fol. 127] could be sold, but the subservient patented article couldn't be sold unless they made their peace with the holder of the dominant patent.

In the arrangement the Southern people licensed Line to use the dominant patent, the Lemmon patent, with a cross-license back, and gave Line also the right to license the rest of the industry with price control, and in the outcome you had Line Material, much as Gypsum in this case, licensing the entire industry to make drop-out fuses.

The question then was whether that was a combination in restraint of trade in violation of Section 1. As Mr. Bromley pointed out, we contend that the court could readily have decided that case on substantially the reasoning that they did in this case. There you have a drop-out fuse industry, all of them are in the price-fixing agreement, and the question would be whether or not that would be unlawful. The court held that it was unlawful, but in the course of its opinion, instead of expressing as they did in the Gypsum case the combination of manufacturers to regiment the industry and therefore getting it out of the G.E. case, they stressed the fact that here were two patents, that neither patent holder alone could have licensed and price-fixed his article, that when they put the two patents together and then licensed the industry, that the combination and the price fixing based on a combination went beyond anything that the court had theretofore held.

[fol. 128] The language of the court is fairly clear. On page 37 it says:

> "While the General Electric case holds that a patentee may, under certain conditions, lawfully control the price the licensee of his several patents may charge for the patented device, no case of this court has construed the patent and anti-monopoly statutes to permit separate owners of separate patents by cross-licenses or other arrangements to fix the prices to be charged by them and their licensees for their respective products."

Chief Justice Stephens: You are reading from page 37 of your own brief?

Mr. Steffen: Yes, the top of the page, Mr. Justice Reed's opinion from the Line Material case.

Chief Justice Stephens: I see, thank you.

Mr. Steffen: You see, what he is pointing out there as a further exception to the General Electric case is where you have two patents that are put in the hands of one patent holder and then he licenses the industry. He says no case has gone that far, that the General Electric case doesn't go that far.

Now, in this case here we have in the summer of 1929 admittedly the "starch" patent and the "foam" application, which subsequently became the "Roos Foam" patent. [fol. 129] As you can see by reading the patents in the complaint, they both were patents to make a porous or cellular board. They both were to make a lightweight board.

The "starch" patent has a patentable feature, the fact that it made the paper bond adhere better to the cementitious core and, of course, the "foam" patent had as its patentable feature a multiplicity of cells, making it a porous board.

Now, in the summer of 1929 when they were negotiating the present licenses, they first proceeded under the "foam" applications. Then when Universal said, "We have got a patent covering the use of starch, making a lightweight board", you then see them bringing the two together, in-

stead of Universal licensing U.S.G. to relicense the industry, as they did in Line, Universal sold to U.S.G. It was a different arrangement, reaching the same result.

In other words, let's take the general language of Mr. Justice Reed and I will read now on page 37 from the second quotation:

> "Where two or more patentees with competitive"——

and the "starch" and "foam" patents were certainly competitive——

> "non-infringing patents combine them"——

that was done——

> "and fix prices on all devices produced under any of the patents, competition is impeded to a greater degree than where a single patentee fixes prices for [fol. 130] his licensees."

We have never decided that the G.E. case covers that situation but, of course, the court in the Line Material case had to go on and find that all of the licensees knew each of them was in the agreement and that the purpose was to fix prices, that they did fix prices just as they have here; but the court made a further argument why the General Electric case did not apply.

Now, that brings me to the matter of monopoly. I think our case here on monopoly is even clearer than on conspiracy. In other words, that there is a violation of Section 2 and that there is no genuine issue as to any material fact concerning the existence of a monopoly.

In the first place, of course, you lay aside the General Electric case because they have gone beyond anything that was permitted under the General Electric doctrine. The opinion on page 39, the Paramount opinion. I have read two of those excerpts, and it clearly indicates that the General Electric case on the charge of monopoly—the Paramount case had to do with monopoly as well as Section 1—but on the charge of monopoly that likewise the General Electric case gives no protection in the circumstances of a case of this sort.

Now, the next matter is the matter of purpose. Must it be shown—— This is where the argument came up. Must it be shown that the defendants intended to monopo- [fol. 131] lize or that they had a purpose of monopolizing?

In the very recent case, the Paramount case, the court said—this is in the middle of page 40 of our brief:

> ". . . we pointed out in United States v. Griffith . . . that 'specific intent' is not necessary to establish a 'purpose or intent' to create a monopoly but that the requisite 'purpose or intent' is present if monopoly results as a necessary consequence of what was done."

That, of course, follows the same reasoning as in the intent cases? It is not necessary to show that the parties intended to do what they did. The opinions are full on that score. All that is necessary is to show that they did what they did.

Back on page 34 I can read from the patent case, which is as clear as any. This is at the foot of the page:

> "Bearing in mind that such was the nature, object and scope of the conspiracy, we regard it as altogether plain that by its necessary operation it would directly and materially impede and burden the due course of trade and commerce among the states and therefore inflict upon the public the injuries which the anti-trust act is designed to prevent. . . . And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, [fol. 132] for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary."

We think that language, "cannot be heard to say the contrary", means just what it says, that where you find a group, a combination, in charge of an industry, which meets all the other tests—it is a combination, they are former competitors, it does constitute restraint of trade; whether they intended to or not is immaterial, and they cannot be heard to say that they didn't intend.

That will dispose, may I say, of maybe 10 or 15 of the proffers of proof in this case.

They say: "We didn't intend to eliminate jobbers, we didn't intend to do this, we didn't intend to do that, or at least it hasn't been shown that we didn't intend."

The court has said, without any equivocation at all, that you don't have to show that they had a specific intent. Probably the strongest language is in the Griffith case itself, here on page 35, where they cite Mr. Justice Learned Hand:

> "It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's [fol. 133] conduct or business arrangements. . . . To require a greater showing would cripple the Act. As stated in United States v. Aluminum Company of America . . . , 'no monopolist monopolizes unconscious of what he is doing.' Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the act."

If we couldn't show that they fixed prices or that they did any of these other things, then we might have to show that they intended to do so in order to build a conspiracy, but where they have fixed prices and where they have eliminated competition, then there would be no need of any showing of specific intent.

Chief Justice Stephens: Are you not unavoidably thrown back, even in your monopoly argument, to the difficulty with respect to action in concert? Because if the United States Gypsum Company had licensed only one competitor to manufacture closed-edge board, or after the expiration of the Utzman patent, licensed one to manufacture "bubble" board and "starch" board, then just as in the General Electric case as between Westinghouse and General Electric, there would have been a complete monopoly so far as the manufacture and sale of gypsum board, or tungsten filament in the General Electric case, is concerned.

Yet, the Supreme Court apparently does not condemn [fol. 134] as a monopoly the situation that exists in the General Electric case although 85 percent of the trade was controlled at the outset, and, as I remember the figures, ultimately 97 percent of the filaments made and sold were tungsten. The Supreme Court apparently does not condemn as a monopoly a single patent license to one licensee with price-fixing provisions although that does result in a monopoly, just as truly a monopoly as where you have a dozen licensees, because by definition no one can manufacture and sell the patented board except the patentee and the single licensee.

There is a monopoly, a complete monopoly, in that situation. The Supreme Court holds that monopoly not illegal, just as it held the monopoly in the General Electric case was not illegal. But it apparently holds in this case that, according to your contention, there has prima facie been shown a monopoly.

Doesn't that necessarily follow from the fact that the Supreme Court sees in this case more than one licensee. Therefore, isn't the monopoly argument necessarily tied into the question of action in concert?

Mr. Steffen: I would answer that: It is true that the Supreme Court found that there was a prima facie showing. I am moving the argument on further, as you appreciate, to show that there, moreover, is no genuine issue as to any material fact. I think that on your express ques- [fol. 135] tion that perhaps the court is illogical. I can make the same argument I did before. I don't think this Court can, in the face of these several decisions, however, expand once more or attempt to expand the doctrine of the General Electric case to cover a broad situation of this sort.

The court has been very explicit. It may not be logical, but it has been very explicit.

I would make the argument that we did on the hearing some time ago, that while logically you can say that in the General Electric case there was, while only one, a license which covered perhaps 75 percent of the production, that here we do have a 100 percent; and if you had to make a distinction in terms of percentages, that we have here a

complete monopolization of the entire area East of the Rocky Mountains.

Chief Justice Stephens: I am not suggesting at all, Mr. Steffen, of course, that we should attempt to expand any ruling made by the Supreme Court. If we can find what the Supreme Court ruling means, we are commanded to follow it since we are trial court judges and bound by the Court's decisions.

The point of my question was merely this: I understood you to argue that apart from the question of action in concert and entering into industry wide license agreements, there is a clear case of monopoly established here.

Mr. Steffen: That is right.

Chief Justice Stephens: And I am still puzzled to know [fol. 136] how you can reach that without first meeting the contention, that I suppose the defendants will make, that they still have a right to be heard and to have a day in court on the question whether or not they did act in concert.

Mr. Steffen: On the monopoly charge?

Chief Justice Stephens: In entering into the licenses, more than one license, which resulted in a monopoly.

Mr. Steffen: In my argument I attempt to show that so far as the conspiracy charge is concerned, that the defendants in effect have admitted that they entered these licenses each knowing that the other was going to enter or that the others did enter and that beginning with May, 1929, on straight through we have a fairly clear record that there was adherence to a common plan with knowledge that the others were adhereing to it and carrying it out.

Now, let's look at the monopoly charge. The test of whether you have a monopoly has been pretty clearly stated in the American Tobacco case, as the most recent case. On page 40, we lay it out, the quotation there from Mr. Justice Burton:

> "A combination may be one in restraint of interstate trade or commerce or to monopolize a part of such trade or commerce in violation of the Sherman Act, although such restraint or monopoly may not have been actually attempted to any harmful extent"—

[fol. 137] In other words, he is saying you may have a monopoly even though you didn't carry it out, and then he goes on:

> "The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised"—

For example, to the high and arbitrary levels.

> —"and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so."

Now, in the American Tobacco case, it came up on that narrow issue, whether or not there had to be a showing whether they had charged monopoly prices or that they actually had kept other people out of the industry. The court said, to make out a case you just have to show that they had the power, nothing else, to exclude competition or to charge monopoly prices.

Now, in our case we are so limited. We can show they did charge monopoly prices and that they did exclude competition. There is no question in the case at all but what they are all of the manufacturers in the area East of the Rocky Mountains. There is no question in the case at all but what they charged just such prices as they saw fit, not only a monopoly in the sense that a small group might do it but a monopoly in the sense that Mr. Sewell Avery alone could practically dictate what the prices and all the terms and conditions in the industry should be. That is about as supreme a monopolistic power as you can get. Moreover, he [fol. 138]used it.

So that, on the charge of monopoly, as you prove a monopoly, you prove it simply by showing that they are all the manufacturers in the area covering an appreciable amount of commerce and that they not only had the power to charge monopoly prices but that they did charge monopoly prices.

Mr. Bromley says, "Of course, we fixed prices and fixed prices of our competitors." They had a complete monopolization, since November, 1929.

Now, on the matter of excluding competition, we point out on page 41 there that there has been an exclusion in

the sense that Niagara, Universal and Atlantic have been bought up, Oakfield has been bought up, and, while this action has been pending, Texas has been bought, as we understand it, by Celotex, and that, therefore, you have a steady process of concentration in the industry.

But beyond that the matter of jobbers, that is, the distribution part of the business, the matter of excluding jobbers. There is no question in this record at all, and the defendants do not offer to prove by their proffer of proof, that jobbers have not been excluded.

I might say to your Honors that when we were before the Supreme Court, the point that was argued here was made. Mr. Bromley was saying to the court that, "Well, there are jobbers in the industry." The court questioned him as to, "Well, what do you mean?" And he says, "Well, there are [fol. 139] still jobbers in the industry."

And then the Chief Justice leaned over and he said, "Well, what do you mean? They just do business for the love of it?" And everybody in the court room excepting counsel for the defendants laughed.

Jobbers have been eliminated in the industry, and that under the test of the American Tobacco case, if you have a group of people in an industry who have power either to charge monopoly prices or exclude competition (and not only do they have the power but they have done it), you have proof of a conspiracy.

We also took up the matter of Cardiff Gypsum Company. We have quite a lot of material in the record. Defendants do not offer to prove anything to the contrary in their proffer of proof. Cardiff Gypsum Company must be taken to have been eliminated, and that is certainly exclusion of a competitor.

That, I take it, will conclude my formal argument.

My main purpose next, your Honors, is to take up each of the defendants' offers of proof. I think, perhaps, it would be better to hear Mr. Bromley on what he proposes to prove in the light of that, and then I can take up in my remaining time what we think of those various offers of proof.

We put them in three broad categories. There are 29 of them.

Chief Justice Stephens: If you can conveniently do so, [fol. 140] I think it might be better, so as not to be confusing to the Court, to discuss the offers of proof now. If, after Mr. Bromley discusses them, you wish to be heard in reply, we will give you an opportunity.

Mr. Steffen: All right.

Does the Court have before it the defendants' Offer of Proof?

I have three categories. We have one category which includes 29 of the offers in which, as we see it, for purposes of this motion, there is no dispute. In fact, much of the evidence that they offer is already in the record. In fact, I think practically all of this is in the record. That is 29 of the itemized offers.

We have another group of about 11 where their main contention is that they didn't intend to do this or didn't intend to do that; and our position there is that it doesn't make any difference whether they did intend to or not, they did do it; and they don't deny that they did.

Our third category is a group of about 22 proffers which are phrased in terms of "there is no agreement or no understanding (to do what they did)", and I would like to take them up separately. If I may just list the first group—if you want to check these, we say that Offers Nos. 4, 6, 7, 8, 9, 10, 11, 12, 13, 19, 21, 22, 24, 25, 26, 27, 28, 31, 32, 33, 34, 35, 36, 38, 39, 40, 43, 50, 61 and 62——

[fol. 141] Chief Justice Stephens: All those marked with a check mark, you contend are what?

Mr. Steffen: Those are restatements of fact that are already in the record or of things that are not in issue for purposes of this motion.

Chief Justice Stephens: Restatements of fact that are already—what?

Judge Jackson: In the record.

Mr. Steffen: In the record or not in dispute for purposes of this motion.

Chief Justice Stephens: Very well.

Mr. Steffen: I will give you as an obvious example No. 6 on page 2:

"Beginning prior to 1912 and continuing thereafter U.S.G. developed by its own research the new closed-

edge gypsum board and the processes for the manufacture of the same, and obtained," and so on, and so on.

Then, continuing:

—"covering said improved closed-edge board and subsequently other patents covering said improved board and the processes for making the same . . . covering a complete machine and apparatus for making said patented board, which was issued on February 10, 1920. All of these inventions were made by employees [fol. 142] of U.S.G. in the performance by them of research work for which they were employed, and the applications for and letters patent for such inventions were duly assigned to U.S.G. as its own property."

A lot of that is in the record, it is in your Honor's opinion, and it would be a complete waste of your Honors' time to listen to the defendants put all that stuff back in; and even though it were now introduced, it would be immaterial anyway. It doesn't change the determination that your Honors would make; whether it was prior to 1912 that they began their research, and so on, is more or less beside the point.

Now, I think that is true, with some variations, perhaps, but it is true, I think, of all 29 that I have read. This cuts their proffer of proof in two.

I call your attention to 36, for example, over on page 14, which says:

"The licenses, in the form of a single document replacing the prior license of the licensee and including the starch patents and bubble board applications, were subsequently mailed to the licensees. Niagara," and so and so, and then they cite the Government's exhibits.

Well, what in the world—they are exhibits, they are in evidence already. Why bother with any further offer of proof on that score? All of those offers, as we see it, [fol. 143] are already part of the case and there is no issue

on them, and the defendants ought not be permitted to take the Court's time.

Now, the next list. This category is composed of those cases where they are contending that there was no purpose or intent on the part of the defendants to do the things that were subsequently done.

Chief Justice Stephens: No intent or purpose?

Mr. Steffen: No intent or purpose to do what was subsequently done. They are: 5, 46, 47, 48, 49, 51, 52, and 53.

Chief Justice Stephens: Is that all?

Mr. Steffen: 56, 57, and 59. Those are all clearly phrased in terms of purpose or intent, as we read them, and since purpose or intent is immaterial, assuming you are shown a combination, as we think we can, those offers are out of place and would not justify the defendants going forward in their case.

All the remainder, which I do not need to list I take it——

Chief Justice Stephens: It will be convenient for me, if we list them and mark them with the third type of legend. I am marking each one with a different kind of mark.

Mr. Steffen: These are no-agreement cases.

Chief Justice Stephens: That is, 1, 2, 3——

Judge Garrett: We can get these from the official re-
[fol. 144] porter.

Chief Justice Stephens: It helps me to get them down now. 14, 15, 16, 17, 18, 20, 22, 23. What is 22?

Mr. Steffen: 22 I placed in No. 1 category.

Chief Justice Stephens: That is in No. 1 category?

Mr. Steffen: Yes, sir.

Chief Justice Stephens: I am sorry, I didn't understand that. 23, 29, 30, 37, 41, 42, 44, 45, 54, 55, 58 and 60. Now, what category do you put those in?

Mr. Stephen: Those are in the "no-agreement" or "no-understanding" category.

I can illustrate that with 56 and 57, your Honor. It says:

"The license agreements were not executed with any intention to eliminate jobbers. There was no agreement or understanding among the defendants or any of them to eliminate jobbers." No. 57 says:

"The discontinuance of the jobbers' discount provided for in the price bulletins resulted solely from

the exercise by U. S. G. of its right to establish a price for a patented product. U.S.G. did not have any agreement or understanding with the other defendants or any of them that such discount would be discontinued."

[fol. 145] Now, you will notice that 56 and 57 do not offer any new evidence, they do not offer any evidence as to whether jobbers have or haven't been eliminated, and therefore our prima facie case stands, that they have been eliminated.

The Supreme Court held that this was the class of distributors that had been squeezed out.

The whole argument, therefore, turns on whether they intended to eliminate jobbers. I have read you from the patent case and many others that whether they intended to do what they did is beside the point, or that there were no agreement or understanding among the defendants or any of them to eliminate jobbers.

Now, that no-agreement or no-understanding in one aspect is very similar to intent—that they didn't intend to eliminate jobbers, that there was no understanding that they would eliminate jobbers.

In the other aspect it ignores entirely the way you prove a conspiracy case. You don't have to prove a preliminary understanding or agreement. The Interstate Circuit and the Masonite cases—and those cases cite many prior cases, and they say all you have to show that there was at sometime adherence by the defendants to a common plan, whether there was a preliminary agreement or understanding in the record showing that they intended to do or that they had agreements to do it is beside the point. What is [fol. 146] important is to show that at a time they did give their ear to a common plan or course of action which resulted in the restraint of trade. When you look at all of these in that light, all of these, some 22 offerings which are phrased in terms of "We didn't have any understanding or any agreements", you have to push them to one side. They are irrelevant.

What you must show, and what we think we show without any question at all, is that there was adherence at sometime—and we think it was very early—to a common

plan or course of action, the necessary consequence of which was restraint of trade. And in this case, restraint of trade, according to the Supreme Court, did follow, and it had no protection under the General Electric doctrine.

The Masonite case, I think, sustains that position completely, but I think I will defer my further argument until after Mr. Bromley is finished.

Chief Justice Stephens: Will you please recapitulate your last point for me?

Mr. Steffen: The last point, your Honor, is that the defendant's offer or proffer of proof to show that there was no preliminary understanding or no understanding or no agreement among the defendants, (for example, to eliminate jobbers; for example, to have a given price for gypsum board; or, for example, to control distributors; or, for example, to have only a certain amount of dunnage in their [fol. 147] cars, no prior understanding or agreement that they were going to do just that) is substantially asking us to prove that there was a specific intent to do what they did do; and what we have to prove is not this preliminary understanding or agreement but to prove simply that they did restrain trade, that they did, all of them, know that they were doing it, that they acted concertedly, each with the knowledge that the other was doing it, and that the result was, as in this case, the complete regimentation of the industry since 1929. We come at it from the other end and show that we do have a combination astride the gypsum industry, that it has fixed prices throughout, that it has eliminated jobbers—which is admitted—that it has done all of these other things—and the Supreme Court has said that it would cripple the Act.

And they said we could now only get rid of that combination by showing something which is more or less beside the point: that they intended to do that. We don't care about that.

For purposes of proof, after you have a combination in control, as in this case, the court has been very explicit that you do not have to show that they intended, or, as we see it, that there must have been a preliminary understanding or agreement.

Chief Justice Stephens: The Court will be in recess until 2 o'clock.
[fol. 148] Thank you, Mr. Steffen.

(Whereupon, at 11:59 a. m., a recess was taken until 2:00 o'clock p. m., of the same day.)

[fol. 149] *Afternoon Session*

2:00 p. m.

Chief Justice Stephens: Mr. Bromley.

ARGUMENT ON BEHALF OF THE DEFENDANTS

By Mr. Bromley:

Mr. Bromley: May it please your Honors, in order to decide this motion, an answer must be given to the fundamental question. That question may be phrased variously, but in substance, it is this: Is industry-wide licensing with price fixing followed by adherence thereto on the part of the licensees ever in any circumstances lawful?

To put it another way: Is industry-wide licensing with price fixing followed by adherence on the part of licensees to the price provisions illegal per se?

What has the Supreme Court said about that in this decision?

As I listened to Mr. Steffen this morning, it seemed to me that he has ended up, taking everything that he has said and trying to judge its total effect, by the assertion that a mere plurality of licenses with price-fixing provisions, observed and adhered to, is per se unlawful, and, therefore, there is nothing relevant or material which the defendants could possibly offer since it is admitted that licenses were executed, that they did have price fixing provisions, that there came a time when they were industry-wide, and that [fol. 150] the licensor fixed the prices and enforced its rights in that regard as best it could, and the licensees in the main observed the prices. Albeit there is a great deal of evidence that many of them were astute to find ways to avoid their obligations in that regard.

Our position is that the Supreme Court decision did not

by any means enunciate the principle that mere plurality of licenses resulted in per se violation of the Sherman Act.

Judge Jackson: Even though it blankets the whole industry?

Mr. Bromley: Even though it blanketed the entire industry 100 percent, and even though there was strict adherence on the part of everybody to the price-fixing provisions of the license.

That interpretation of the Supreme Court opinion is outlined in our brief and proceeds somewhat in this fashion: The court reversed the order of this Court which dismissed the complaint, concluding that by the record now presented violation of the Sherman Act is clear. That is at pages 401 and 402 of the reported decision.

Chief Justice Stephens: The reported decision of the Supreme Court?

Mr. Bromley: Yes, sir, 333 U. S.

Chief Justice Stephens: You don't have that reference in the slip opinion, do you?

[fol. 151] Mr. Bromley: I can get it, yes, your Honor. It is page 36.

Chief Justice Stephens: What is that statement now, Mr. Bromley? Read it again?

Mr. Bromley: It is from page 36, line 3:

> "By the record now presented, violation of the Sherman Act is clear."

That is in the concluding paragraph of the opinion. But before reaching that conclusion and as essential foundation to that conclusion, the court decided two matters: first, it decided that the declarations and acts of each of the defendants were admissible against all of the defendants as declarations and acts of co-conspirators, and, second, it decided that certain findings of fact made by this Court would bar a reversal of this Court's order of dismissal if the findings of fact were accurate.

It found that the findings of fact referred to were erroneous. So that I say, as foundations to its conclusion that the proof established violation of the Sherman Act, it first had to find that it could consider the declarations as binding upon everybody.

What for? Obviously, to show purpose, pre-arrangement, scheme, plan, conspiracy; and it, secondly, found that it could not reverse the order if the findings of fact were correct.

Well, what is the most important finding of fact made [fol. 152] by this Court in that respect? It is Finding No. 118, that there was no plan to blanket the industry.

In discussing the declarations and holding that they were binding upon everybody, the Court was careful to point out that the license agreements and the price bulletins were sufficient to establish a prima facie case of conspiracy and that the license agreements and the bulletins establishing a prima facie case of conspiracy, the declarations of each were binding upon all.

Now, the findings of this Court which were set aside were not merely Finding No. 118, to which I referred, which was that the defendants did not associate themselves in a plan to blanket the industry under patent licenses and stablilize prices, but they were also findings of fact in great detail to the effect that there was any agreement among the defendants to eliminate the production of open-edge board.

Thirdly, that the license agreements were not executed with an intent to eliminate jobbers, that the discontinuance of the jobber's discount was merely the exercise by the licensor of its right to establish a price for a patented product, and that complaints by licensees that other licensees had sold to jobbers at a discount did not establish concerted action to eliminate either the jobbers or the discount.

Finally, those findings, all of which were reversed, made by this Court, that there was not any understanding that [fol. 153] prices would be raised or fixed upon plaster or upon any unpatented products, and that the bulletin provision prohibiting the reduction of the price of unpatented goods was designed merely to protect the price of the patented products and was not used to stabilize the prices of unpatented materials.

Furthermore, the Supreme Court found it unnecessary to determine whether or not the other findings of this Court were erroneous, but stated that enough had been said by

the Supreme Court as to the findings and the evidence to enable this Court to pass upon the facts as they may come before it on further proceedings in accord with our present ruling.

Now, I say that in view of the Supreme Court's action in setting aside these findings which, after all, went to the heart of the charge of conspiracy, it must be presumed clearly that the Supreme Court regarded the evidence of the Government as establishing prima facie merely that the defendants had associated themselves in a plan to blanket the industry and that there were agreements to eliminate open-edge board, to eliminate jobbers, and to stabilize the price of unpatented products.

The Supreme Court's reasoning, I think, may be analyzed in summary form this way: The license agreements and the bulletins established a prima facie case of conspiracy. This prima facie case having been thus established, the declarations became admissible against all. In view of all the evidence, then—that is, the prima facie combina-
[fol. 154] tion flowing merely from the license agreements and the price bulletins, plus the declarations—in view of all that, the Supreme Court concluded that there was prima facie evidence of a conspiracy and the Supreme Court was careful to put in words just what that conspiracy, which was prima facie established, according to it, was.

The statement of that conspiracy appears at page 34, at the bottom, of the slip opinion in the Gypsum case. The paragraph starts:

> "The General Electric case affords no cloak for the course of conduct revealed in the voluminous record in this case. That case gives no support for a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized."

Now, I conceive that that is the statement of the conspiracy which the Supreme Court has said was prima facie

established, and I say that the opinion then establishes nothing more than this:

At the end of the Government's case, the Government [fol. 155] had met its initial burden of making out a prima facie proof of combination sufficient to withstand our motion for dismissal and that the prima facie conspiracy thus made out was something more than a mere plurality of licenses.

Now, if it weren't, why the necessity for setting aside the findings? If mere plurality of licenses was enough, the Supreme Court would have conceded the accuracy of the finding, perhaps, that there was no plan, but would have said such a finding in these circumstances is without legal probative force because you don't need a plan in order for the Sherman Act to condemn industry-wide licensing.

Isn't it plain that the Supreme Court by that action in reversing these findings and sending the case back has said, "You have got to have something more than industry-wide licensing; you have got to have a plan, not a plan resident in the multiplicity of the documents themselves, but a plan outside of the documents, and understanding among everybody that the documents would be used to accomplish"—what?—To accomplish the description which it states on page 34 is the conspiracy as it judges from the evidence was prima facie established. The prima facie conspiracy which the Supreme Court said was established by the Government at the end of its case involves the four elements which the Government charged in its pleading: a plan to blanket the industry, an agreement to eliminate open-edge board, an agreement to eliminate a class of dis- [fol. 156] tributors—that is, jobbers—and an agreement to stablilize the price of unpatented products.

The Government in its statement of points and authorities filed two weeks ago accepts this same view, it seems to me, of the court's opinion, because in that document, in Points 3 and 4, it says that the proper inference to be drawn from the basic facts is that the defendants associated themselves together in a plan to blanket the industry under licenses and stabilize prices, and then repeats the four elements of the plan as I have read them and as the

Supreme Court described them and listed them on page 34 when it summarized the conspiracy which it said had been established prima facie.

Now, Mr. Steffen, I think, has on the argument abandoned that position and said that the Supreme Court has enunciated the doctrine that mere plurality is enough and there is no defense against that.

Well, the Line Material case, for me, throws a good deal of light upon the soundness of Mr. Steffen's contention. You will recall in that case that the court distinguished the General Electric case on the ground that there was a combination or cross-licensing of two non-infringing patents for the purpose of controlling prices and stabilizing the industry. But it is plain from that opinion that the court placed its stamp of approval upon everything that was done there short of cross-licensing, because in the recita- [fol. 157] tion of facts near the beginning of the opinion under (Roman) I, "The Facts," it adverts to these undisputed elements. On page 9 of the slip opinion in Line Material, down about 10 lines:

"There can be no doubt, however, that each licensee knew of the proposed price provisions in the licenses of other licensees from the circulation of proposed form of license on October 6, 1939, subsequent consultations among the licensees and an escrow agreement, fulfilled July 11, 1940. That agreement was entered into after General Electric took its license and required for fulfillment the acceptance of identical licenses by Matthews, Kearney, and Railway. The licenses that were the subject of the escrow contained the price provisions of General Electric's license. This awareness by each signer of the price provisions in prior contracts is conceded by appellee's brief. A price schedule became effective January 18, 1941. Thereafter, all the appellees tried to maintain prices. Where there was accidental variation, Line wrote the licensee calling attention to the failure.

"The licenses were the result of arm's length bargaining in each instance."—A fact which we are anxious to prove in this case.

"Price limitation was actively opposed in toto or re-

[fol. 158] striction of its scope sought by several of the licensees, including General Electric, the largest producer of the patented appliances. A number tried energetically to find substitutes for the devices. All the licensees, however, were forced to accept the terms or cease manufacture."

Now, isn't it perfectly plain that as far as the Line Material case is concerned, those facts, even more indicative of concert of action than in our case, because of the presence of the escrow arrangement in Line, all of those facts were thought by the Supreme Court not to result in condemnation of the arrangements there found, but that the sole reason for holding that the law had been violated was that a majority of the court thought there was an unlawful arrangement between two patent owners by virtue of the cross-licensing of the Lemmon and Schultz patents even though there was interference between the two patents in the sense that while Lemmon dominated Schultz, Schultz' was an improvement patent and the superior product could not be practiced without the use of both patents. It would not have been necessary to rest the decision upon that ground in view of the Gypsum case if mere plurality of licenses in the mind of the Supreme Court was enough to result in violation of the Sherman Act; nor would it have been necessary in the Gypsum case to do more than say that mere plurality of licenses being established without [fol. 159] dispute, adherence on the part of everybody to the prices fixed and everybody being 100 percent of the industry, is enough in itself to violate the Sherman Act.

I submit, if the Court please, that the Supreme Court has indicated plainly that there is an area of proof which the defendants are entitled to show if they can to rebut the prima facie inference which the Supreme Court drew that there was a conspiracy to accomplish, broadly, regimentation of the industry both in its patented and in its unpatented products, and that there was a conspiracy to regiment the industry by means of an intentional destruction of a class of distributors—to-wit, the jobbers—and an intentional suppression of the manufacture of the so-called unpatented open-edged board.

I detect in Mr. Steffen's argument the constant urge of contending that the General Electric case has been overruled. Certainly, he makes no bones about saying that the General Electric case has been confined to one licensee. Well, that was not the court's position in the Line Material case, because there, admittedly, there were a number of licensees, as many as there were in the Gypsum case, all with identical licenses, all entered into with knowledge, and most, if not all of them, put up on a conditional delivery, the condition of which was that General Electric or somebody else or some certain number should take licenses. That was a device, a common device, to insure [fol. 160] action in concert and to make certain that no one became bound unless all became bound.

In the Gypsum case, all that the Supreme Court has said is that "looking at the declarations we think prima facie the defendants should be called upon to explain and rebut the inference that these licenses were given and taken by reason of a prior understanding that this would be a good way to regiment an industry which prior to taking of the first license had been troubled, if you will, by a price war."

That to me means that we must necessarily have an opportunity to introduce evidence rebutting that inference.

Now, the Government in its points and authorities assert that the basic or subsidiary facts in the instant case are not in dispute. The dispute between the parties is as to the proper inference to be drawn from the basic facts.

Well, I take it that every fact in the case is in dispute except the plurality of licenses containing price-fixing provisions and subsequence adherence to those provisions.

Chief Justice Stephens: It is not in dispute that the licenses were executed, is it?

Mr. Bromley: No, sir. I meant to include that, that the licenses were executed, that they did have price-fixing clauses, and that the price-fixing right was exercised and enforced and that the licensees observed their obligation in the main.

Chief Justice Stephens: I said in the opinion of the [fol. 161] Trial Court, speaking for the Court, something almost to the effect which you said yourself, that there

was no conflict of evidence in the usual sense, that the conflict was one of inferences to be drawn from the evidence. But I had thought, myself, that that kind of conflict, nevertheless, raised issues of fact—where there is a dispute as to the inferences to be drawn from admitted facts, which inferences lead to determination of the ultimate facts in issue in the case—that there was thus an orthodox conflict in the case despite the fact that some basic facts might not be disputed.

Mr. Bromley: Of course, I think that is entirely sound. I don't know what the Government means by the basic facts not being in dispute. I was suggesting merely that they can mean no more than the execution of the licenses. Their contents and their observance are not in dispute.

Certainly, the contention supported by some evidence in the form of a declaration that Mr. Avery was not willing to license anyone unless all took licenses is in dispute, and we want to prove, among other things, from Mr. Avery that it was his position at all times that he was willing to license any or all or any number at any time and cared not a whit what anybody else did.

I was surprised this morning to hear Mr. Steffen, as I understood him, say that Proffer of Proof No. 4 was not [fol. 162] disputed by him or that it was already proved in the record, one or both.

Proffer of Proof No. 4 is a very short one:

> "At all times the licensor was willing to license any one manufacturer without regard to whether or not a license was taken by any other manufacturer or manufacturers."

I am glad to know he doesn't dispute it, if he doesn't, but my problem of proof and the reason I want to prove that from the lips of a witness is that I am aware of the fact that there is in evidence a declaration by somebody which the Supreme Court says is binding on my client, to the effect that Mr. Avery was not willing to license unless all took a license.

Chief Justice Stephens: The point at which I made the remark in question is page 105 of the printed trial court's

opinion, which was made by the defendants. I don't have the reference to it in the Supplement handy. It reads:

> "The evidence offered by the Government in the instant case is mostly circumstantial and the subsidiary facts in the case are largely not in dispute; it is in respect of the meaning of these facts, of the inferences to be drawn from them, that the parties are in contest."

Mr. Bromley: Now, what is it the defendants desire to offer by way of evidence?

[fol. 163] Well, to summarize it, the defendants deny and have always denied that there was any plan among them to blanket the industry with patent licenses and stabilize prices. Accordingly, they have offered to prove in the very first numbered item of their offer of proof that there was not any agreement or understanding between the Gypsum Company and the other defendants or any of them that they would associate themselves in a plan to blanket the industry under licenses and stabilize prices or that they would issue or cause to be issued substantially identical licenses to all the defendants or any of them; and we desire to call the men who were concerned with the negotiation, preparation and execution of the licenses on behalf of the licensor to testify that in offering and issuing the licenses to the other defendants, the licensor acted independently, not by virtue of any plan or understanding with anybody, that it would exercise its right to fix prices, that it would fix prices, that it would or would not put a price-fixing provision in the license, and that we were at all times willing to license anybody who was agreeable to the terms which we laid down in December, 1925, and from which we never varied, from that date down to the present time.

Judge Garrett: Didn't the Supreme Court substantially find that?

Mr. Bromley: It adverted to that fact, that we never deviated from our position, but I think it went on to say [fol. 164] in spite of that and in spite of the fact that the writer of the declaration, who said that Avery was not willing to license one, in spite of the fact that Avery was willing to license one according to the Supreme Court, it

found prima facie from other evidence that there was a plan.

Now, did it mean in saying that there was prima facie evidence of a plan what Mr. Steffen, it seemed to me, finally was driven to contend this morning, that the plan is to be found in the adherence with knowledge through the most favored nation clause, if you please, or otherwise, that others were likewise holders of licenses and adhering?

I thought that I detected finally a contention by Mr. Steffen that that was the plan about which the Supreme Court was talking.

Well, it seems to me absurd to contend that that was the plan about which the Supreme Court was talking when it said that the conspiracy had been prima facie established. What the Supreme Court was talking was something that was arranged ahead of time and not something that sprang into being after the licenses were executed.

He adverted to the fact that in the 1932 meeting when Mr. MacLeish threatened the licensees with legal action or cancellation if they didn't observe the licenses, the licensees could then have withdrawn from the conspiracy, as he put it, but instead of withdrawing they went right ahead and [fol. 165] observed their obligations under the license.

That is not what the Supreme Court decided. It didn't decide that the conspiracy sprang into being after the event and arose and flowed from the observance of the obligations imposed by the contract. What it said was that there was prima facie evidence of a conspiracy to accomplish at least the four objectives listed in its opinion. That must mean that it thought there was evidence of action other than the mere offer of a license and its acceptance and adherence to its provisions. If it didn't mean that, then that would result, it seems to me, in the absurd conclusion that if you could have a situation, as the Presiding Judge indicated in his opinion, where nobody knew what anybody was doing, but over the years it finally came to pass without knowledge on the part of anybody that everybody in the industry was licensed, with price fixing, that that day a conspiracy would have resulted, and I suppose it is possible to conceive of licensor owning a patent and offering a license and having its competitors, seriatim over the years,

each taking a license without knowing whether or not anybody else had one. It is possible to conceive of that happening, and I also suppose Mr. Steffen's contention would be that that was unlawful when all or a substantial number had arrived at the point where they had licenses. I don't think the Supreme Court said that at all. I think it said there must be something other than the mere taking [fol. 166] of the license, there must be a plan to blanket the industry and accomplish results in the minds of everybody beginning at some date and continuing thereafter, a plan to regiment the industry and to control prices, which goes way beyond the legitimate interest of a patent owner in protecting the rights given to him by the patent and enforcing them by the means of licenses.

Now, obviously, there could not have been, I submit, any plan, in the sense in which I use the word, to which the licensor was not a party, and the licensees could have every so many discussions among themselves as to what they should or would or could do, but unless the proof convinces this Court that the licensor was a party to an understanding or plan to do something more than merely offer a license to all comers, it is impossible to conclude that there was a plan or conspiracy which violated the Sherman Act.

That is why I submit that it is vital for the Court to hear the evidence coming from the patent owner, the licensor, the keystone of any conspiracy, if there was one, in order to determine whether the inference, which the Supreme Court has drawn from the declarations, of a scheme to go beyond mere patent licenses is actually the fact.

The defendants deny and have always denied that there was any agreement or understanding among them or any of them to eliminate the production of open-edge board [fol. 167] and they desire to prove and to show that they had no such understanding, that the discontinuance of the production of open-edge board was due solely to economic reasons, that the defendants were at all times free to make it if they wanted to make it, but that there was no demand for it and it disappeared from the market not as the result of a conspiracy.

Judge Garrett: Didn't that run througout the testimony in the case as it was presented here, as you cross-examined? Wasn't that stated by substantially every person who appeared on the stand?

Mr. Bromley: Yes, sir, there was a good deal of evidence that open-edge board was not marketable, was not desired by the trade, and was inferior in quality. That is true.

Judge Garrett. And any additional evidence that might be presented in that regard would be cumulative merely, wouldn't it? What would be the value of additional testimony on that point? I am just asking the question.

Mr. Bromley: Confining my answer to the question precisely, the Supreme Court has said that there was a prima facie case in spite of that evidence, that there was a conspiracy to eliminate the production of open-edge board.

Now, if I were going to confine myself merely to the proof that it was not marketable and not any good and not desired, it might be cumulative, but, after all, I have an inference to overcome, and evidently the Supreme Court thought that evidence to which we have adverted was not [fol. 168] enough to rebut the prima facie inference which it drew from the discontinuance of its manufacture as well as from the royalty provision in the license.

So I submit I am entitled, if my offer of proof were limited to purely cumulative evidence—that I am entitled, indeed, required—to put in more evidence to rebut the inference which the Supreme Court has said is at least prima facie.

But my offer of proof goes, I think, farther than that, although it does include that. I want to show that they were free to make it at all times, and I want to show the problems involved in its manufacture as tied in with the nature of the board-making machine, and to show how utterly absurd it would be for these men licensed under a patented machine which was designed to make closed-edge board, going to the expense of changing the machine from time to time, or making closed-edge board and trimming off the edges so it would become open-edge board, and I want to show all the difficulties involved on the part of a

manufacturer equipped to make the closed-edge product to turn back to make the inferior open-edge product.

Judge Jackson: I thought they were making open-edge board prior to the time of taking the license.

Mr. Bromley: Some of them were.

Judge Jackson: They must have had machinery for doing that.

Mr. Bromley: I don't think they had our patented machinery. If they did, they were infringing.

[fol. 169] Judge Jackson: But they had their own machinery. They would not have had to retool to do it. They already had the machinery to make open-edge board.

Mr. Bromley: In order to make closed-edge board, they would have had to get our patented machine.

Judge Jackson: Surely.

Mr. Bromley: After they took a license and got our expensive patented machine, what I want to prove is that they wouldn't go back and use an old machine or a different process to make open-edge board. I quite agree they could and had been doing it before.

Likewise, we desire to prove that there was no understanding about the elimination of jobbers, that the discontinuance of the discount was due to the fact that the licensor by this time had its own sales organization which gave it sufficient coverage, and it had no use for jobbers and did not desire that its product be manufactured through that channel of distribution and not because it desired to eliminate their competition in order to get them out of the way.

Finally, we have denied and always denied that we ever had any understanding to stabilize or fix the price of plaster or any unpatented products. I want to show what the plaster prices were, to show that on the face of the proof of what they were they bore no relation to board prices whatsoever, that they were not stabilized or fixed, that they followed market trends in the plaster market [fol. 170] just the way the prices of any unpatented goods did, and to establish from that proof of the actual prices themselves that there was no relationship between the prices actually received for the unpatented and the patented products.

So that to sum it up, we desire an opportunity to submit evidence with respect to every finding which the court has set aside as erroneous in order, if we can, to re-establish the accuracy of those findings.

Now, there are a host of other issues. What do we do about the resale prices of manufacturing distributors?

The Supreme Court, it seems to me, leaves that up in the air.

Well, surely we have got to have a determination at some time, either before the case is closed or before a decree is entered, first, whether or not there was any plan to fix manufacturing distributors' prices, and, second, whether they were fixed.

Some evidence was introduced, some letters, a good many letters were introduced, which on their face might justify an inference that the licensor and the licensees were checking up on the prices charged by manufacturing distributors.

We have available as witnesses the three or — men who acted as secretaries of the Board Survey company and who wrote most of the letters in evidence, who can testify as to why they were sent and what was being done in this [fol. 171] regard. When that evidence is received and added to the evidence of the representatives of the manufacturing distributors who were called here and have testified, I think that any inference that any resale prices, so far as manufacturing distributors were concerned, were fixed will completely disappear as it did on the criminal trial.

But I apprehend in the present state of the record that we are entitled to introduce that additional evidence.

I think it is important to us, likewise—and this is another, perhaps, collateral issue, but one that is important to us—to offer proof having to do with the formation, the management, and the operation of this Board Survey company; to show that it was not the result of any plan or conspiracy to regiment the industry, but that its operations were confined in the same sense that the letters written in the Line Material case were confined to the protection of the rights of the patent holder in an effort to secure the faithful observance by the licensees of their obligations to follow our prices.

I think we are entitled to prove and should prove that the principal patents, at least under which the licenses were issued, were basic patents of such scope as to have great commercial value and that it was essential that each manufacturer have the right to use them in order to stay in business in competition with those who did have such rights.

[fol. 172] I think also we are entitled to show that each license taken or issued by U.S.G. was negotiated at arm's length, as the Supreme Court was careful to state was the fact in the Line case, and that none was executed with any purpose or objective not expressly set forth in the license.

I think we are entitled to justify the prices that we fixed under the license agreements to show that they were not arbitrary or unreasonably high in the sense that they bore no relationship to the value of the product.

I certainly think that we are entitled and should show through the evidence of witnesses familiar with them the purpose, meaning, and effect of the various license provisions contained in the license agreements, which the Supreme Court seemed to think were strong in raising an inference that there was a conspiracy and to show that every provision in there had a direct relationship to price and were not put in there to regiment the industry and secure something that a patent owner was not entitled to—that is, the production of standardized goods.

Now, I would like to turn a moment to Mr. Steffen's argument——

Chief Justice Stephens: I would like to hear you on Mr. Steffen's contention concerning monopoly, among other things you may wish to comment on.

Mr. Bromley: Well, I won't read my note in that regard, [fol. 173] which was to the effect that after your statement I thought it unnecessary to make any mention of his argument, but as I understand his argument, what he means by the monopoly contention is merely that there was a plurality of licenses. It is just another way of restating his contention that plurality of licenses is per se unlawful. Now, that, I think, is something of an afterthought, but there surely is no indication in the Supreme Court's opinion, as I read it, that plurality of licenses is per se unlawful because it constitutes a monopoly.

If the Supreme Court had thought that, wouldn't it have overruled the General Electric case?

Because, surely, no one can say there is any difference in the concept of monopoly between the facts of the Gypsum case and the facts of the General Electric case.

Your Honor repeated the percentages, the 85 percent resulting from the mere combination of General Electric and Westinghouse and the 97 percent when judged upon the basis of the character of the products made in the industry.

Now, surely, there can be no difference between 100 percent of gypsum board and 85 percent or 97 percent of tungsten-filament-incandescent lamps.

Judge Jackson: That is what I thought prior to the Supreme Court's decision in this case.

Mr. Bromley: Well—but I still think so. I don't think [fol. 174] there is any indication in the opinion that they intended to make that distinction.

I think, again, it all comes back to the Supreme Court's conception that there was prima facie evidence of a conspiracy here, something outside of mere plurality of licenses.

I think even this monopoly argument to some extent is tied into Mr. Steffen's argument or at least to the Supreme Court's theory that there was action in concert in the sense of an understanding or conspiracy in advance to regiment the industry by means over and above lawful patent licenses, a conspiracy to have unified action to which the licensor was a party, and an understanding that they would bring about industry control by means of these licenses.

Mr. Steffen started off his argument by reading us again from page 35 in the slip opinion in the gypsum case:

> "Even in the absence of these specific abuses in this case, which fall within the traditional prohibitions of the Sherman Act, it would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices."

I think that means it would have been sufficient to make out a prima facie case. Certainly, its connotation to me is [fol. 175] that action in concert is something more than the end result of an entire industry having licensees under a patent.

And so on page 34, the sentence beginning "The General Electric case affords no cloak for the course of conduct revealed in the voluminous record in this case", what they are referring to when they say "course of conduct" is the conspiracy which they describe in the very next sentence beginning "That case gives no support for a patentee, acting in concert with all members of an industry", to issue and regiment and squeeze out and stabilize unpatented products.

Now, Mr. Steffen referred to that part of his brief on page 24 which contains the footnote referring to remarks by Mr. Justice Frankfurter in which he ended up by saying:

> "I do not think logic, abstract logic, is going to solve this kind of a problem."

Chief Justice Stephens: Where is that in Mr. Steffen's memorandum?

Mr. Bromley: It begins at the bottom of page 24. He starts out by saying "That raises the question".

Chief Justice Stephens: I think perhaps that is the most dangerous obstacle you have, Mr. Bromley. The greatest defect I see in your argument so far, is that it seems entirely reasonable.

Mr. Bromley: That is a sin of which I am seldom guilty. That raises the question of whether that which is being [fol. 176] done singly, being lawfully done, may by being done in combination be and creates a different problem. We agree that is the problem.

Then, he says:

> "Well the argument proves too much and doesn't take account of the Carbide case"—referred to here as Carbide—and he says:
>
> "Because he is a license- of a patent, he does not have any freedom to get that patent, and yet it does invalidate a license that says if you take this you must also sell non-patented goods."

I suppose what he had in mind was that logically it is perfectly true—logically—that a patent owner ought to be able to license a man on condition that he use non-patented goods with the machine. All Mr. Justice Frankfurter was saying is he can't do that, although as a matter of abstract logic maybe he ought to be able to do that.

And so he says we cannot apply abstract logic.

But what did he do when he came to the Line Material case? Why, he swallowed the whole line of conduct which I have read: escrow agreement, knowledge on the part of everybody else, discussions, identical licenses, policing, everything else plus cross-licensing. According to his view, the kind of logic which he said should be applied in this class of case, being something other than abstract, jus- [fol. 177] tified even the cross-licensing; as, indeed, I think was the sound view where you had patents of that interfering nature.

So that this colloquy, to me, does not reflect any view that because abstract logic does not solve all problems under the Sherman Act in the patent field, we must say that a mere plurality of licenses is by itself enough to violate the law. Surely he did not subscribe to any such view as that when he joined with the minority in the Line Material decision.

Now, on page 39 of the Government's brief, Mr. Steffen called attention to quotations from the Paramount Picture decision of recent date by the Supreme Court, and to the fact, in the first quotation, that the court started from the premise that a price-fixing combination is illegal per se and the statement that the court recently held in the Gypsum case that even patentees could not regiment an entire industry by licenses containing price-fixing agreements and applies that to the copyright owner situation in the picture business.

Then, at the bottom of the page Mr. Steffen called attention to the quotation in which the Supreme Court said:

> "We stated in United States v. United States Gypsum Company . . . that 'the rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry

> are not reasonably and normally adapted to secure [fol. 178] pecuniary reward for the patentee's monopoly.' The same is true of the rewards of the copyright owners and their licensees in the present case."

Now, the next sentence:

> "For hereto the licenses are but a part of the general plan to suppress competition."

Now, that is what the court found in the Picture case, in this case from which this language is quoted, a "general plan to suppress competition." That is the important sense and one which characterizes every other word said in the quoted parts of the Supreme Court's opinion in that case. There, as here, the Supreme Court was indicating that where there is a general plan to suppress competition, then the fact that a part of it is a license agreement with a lawful price-fixing clause does not have the plan.

Now, I refer again to Mr. Steffen's contention about adherence on the part of the licensees and their knowledge of what was being done after they took the licenses, and I refer to his argument stated at page 31 of his brief, in which he quotes the colloquy between the Presiding Judge and me at the trial. That quotation is preceded by the sentence: "There can be no question"—begining at the third line from the top.

> "There can be no question whatever that from and after this meeting all the licenses were fully advised [fol. 179] of the purpose of the licensing plan to fix prices, and gave their adherence to it. Moreover, it is admitted that what took place at this meeting was true for following this testimony the following colloquy ensued."

After making the quotation which established only that there was a meeting and that Mr. MacLeish told the licensees if they didn't observe their licenses and their obligations, that their licenses would be cancelled, or they would be sued, or the price-control feature would be eliminated from the licenses—that all appears at the bottom of

page 30, as to what Mr. MacLeish said, what the meeting was about, and when it occurred, October 17, 1932, long after the licenses were executed for the most part.

Then, Mr. Steffen, after the colloquy, says:

> "It is submitted that the meeting of October 17, 1932 is sufficient illustration alone to show that the defendants have acted in concert to fix prices and regulate the gypsum industry. Coupled with the other facts above described, it would suffice to make out a case upon which summary judgment could be based."

Well, I take it that that means you never could have industry-wide licensing if the provisions of the licenses were observed, and I am surprised at the assertion in that form, because it seems to me to be a new theory that we have [fol. 180] no defense now because forsooth in 1932 by virtue of a meeting it is clearly established that all the licensees knew that everybody else had a license and was following the prices.

Well, I assume that was known long before this meeting, and, as I said in the Supreme Court, I assume that when each licensee took his license, he knew that somebody else had taken one before him—that is, everyone after the first one—and that, of course, they knew or assumed—and I am not going to attempt to prove that they didn't—that the other fellows were observing the prices which the licenses provided they should have observed.

So that I find it utterly impossible to conceive that the Supreme Court meant to indicate by its opinion that this kind of knowledge after the execution of the licenses, this kind of knowledge that each had the licenses and all were observing, was enough to establish a per se violation of the Sherman Act to which there was no defense. I can't find anything in the opinion to indicate that in the slightest.

Now, over the page. In the colloquy with Mr. Justice Reed in the Supreme Court, Mr. Steffen takes comfort in the fact that Mr. Justice Reed said, near the bottom of the page:

> "Also, if there is such favored nation clause, each of them must know that it is participating in the general plan."

I said, "Yes, sir; but . . ."

[fol. 181] I take it that everybody who had a most favored nation clause—and everybody did have one—assumed and thought he knew that his license was identical to everybody else's. That is what the clause said it would be, that is what he was entitled to have. He was entitled by that provision to have as favorable a license as anybody else had. I am perfectly willing to admit that every licensee was ready, willing, and anxious to take advantage of that opportunity and to make sure that he didn't have any more onerous conditions imposed upon him than anyone else.

I thought the rest of my answer made it clear that I was not conceding that there was any conspiracy in the sense that I thought we were talking about it in the Supreme Court, because I said:

> ". . . but if the end result is legal how can their knowledge render it illegal in the end result; even with a multiplicity of licenses it is legal, and I do not understand that there is anything in Masonite which is contrary . . ."

In talking about elimination of jobbers, Mr. Steffen emphasized, as he did with respect to nearly every aspect of the case, that we cannot dispute that it has been proved that jobbers were eliminated.

Now, it may be that mere proof of the elimination of jobbers establishes a prima facie case from which an in-

[fol. 182] ference is permissible that their disappearance was due to an unlawful conspiracy; but surely we ought to be permitted to prove, if we can, that their disappearance was not the result of any scheme among us to get rid of their competition but was the normal result flowing from the lawful exercise of the right to fix a price by the licensor; and surely evidence from the lips of the men who levelled off the jobber's price as to why they did it and the circumstances in which they did it will, I believe, aid in the ultimate determination of whether or not there was a scheme or plan to get rid of an uncontrolled source of distribution because, of course, we had no right to control jobbers' prices and did not control them.

Judge Garrett: Mr. Bromley, may I interrupt at this

point? On page 16 of this slip copy of the Line Material case—I am sure this has not escaped the attention of anyone—the writer of the opinion, Justice Reed, says:

> "The writer accepts the rule of the General Electric case as interpreted by the third subdivision of this opinion. As a majority of the court does not agree with that position, the case cannot be reaffirmed on that basis. Neither is there a majority to overrule General Electric. In these circumstances, we must proceed to determine the issues on the assumption that General Electric continues as a precedent."

Now, that presents a somewhat unusual situation in the [fol. 183] Supreme Court, doesn't it?

Mr. Bromley: I think it does.

Judge Garrett: No majority either way, and the interpretation that the writer of the opinion accepts is that of the third subdivision of this opinion—he accepts it, but there is not a majority with him on that, and then there is not a majority there for overruling it.

I don't know how much importance that is in this Gypsum case, but they refer us to the Line case, and we have to interpret Gypsum some way in the light of that. I don't know. I mean, interpret the opinion of the court in the Gypsum case and in the light of the opinion in the Line case, but there was no dissent or concurrences in this Gypsum case; it was a unamimous opinion; wasn't it?

Mr. Bromley: Yes, sir.

Cheif Justice Stephens: All that he meant by referring to the third part of his opinion, as I read the Line Material case, was that he thought the Gypsum case did not permit cross-licensing of a dominant and a subservient patent. He couldn't get the other members of the court to agree to that, and there could be no agreement to overruling it; isn't that correct?

Mr. Bromley: You meant the General Electric case?

Chief Justice Stephens: Yes.

Mr. Bromley: Yes, your Honor, I think that is exactly right.

[fol. 184] Chief Justice Stephens: He meant that the General Electric case in his view did not permit cross-li-

censing of the dominant and subservient patent, and he could not get the other members of the court to agree with him on that subject—at least, not a majority. Also, he could not get agreement to overrule the General Electric case.

Mr. Bromley: I think that is all it means. He, therefore, says that the General Electric case continues as a precedent, and he says "We won't answer the various questions asked by the Government as to how it should be applied to the many and various situations which they put up to the court," but he says:

> "On that assumption where a conspiracy to restrain trade or an effort to monopolize is not involved, a patentee may license another to make and vend the patented device . . ."

Judge Jackson: Does that mean as long as no anti-trust proceeding is brought against them, it is all right, but that the minute the anti-trust proceeding is brought against them that General Electric is not a proper citation, not a proper reference?

Mr. Bromley: I don't think it means that.

Judge Jackson: What in the world can it mean?

Mr. Bromley: I think it means that so long as you don't have a conspiracy—what I have been talking about all the [fol. 185] afternoon long—as long as you don't have a combination to accomplish and unlawful result—that is, a conspiracy to regiment the industry in the broad sense described in the Gypsum case—it is still the law that you can have price-fixing in a license.

Now, true, he uses the singular when he says "a patentee may license another." I suppose he uses the singular only because the General Electric case, as a matter of fact, involved only one price-fixing license. It certainly would have been more helpful to everybody if he had said "A patentee may license another or others", which I think he plainly meant, and I refer again to that part of the opinion in which the plural is used, which I pointed out on the last argument.

Certainly, no one can logically justify the distinction between one licensee and two licensees where the amount

of the restraint is the same, as the opinion of this Court has very clearly pointed out.

Chief Justice Stephens: Of course, there was a plurality of licenses in the General Electric case which, except for the patent laws, would have violated the Sherman Act. They weren't all price-fixing licenses. There was one which limited quantity output and one which limited type. But that seems not to have been commented upon anywhere.

Mr. Bromley: No, and it is so strange that it wasn't because the obvious purpose in the General Electric case [fol. 186] of this quantity limitation, as I think was made clear by the record, was to restrain those particular licensees to make sure that they didn't upset the price situation by limiting them very drastically to the number of bulbs they could produce in any year; and there certainly, in that sense, is no distinction in law between a quantity restriction and a price restriction.

On page 37 of his brief there is a curious argument, in which, for the first time I think, the Government attempts to draw an analogy between the cross-licensing in the Line case and the Gypsum case in so far as Gypsum's purchase of the Haggerty "starch" patent is concerned. That is an ingenious attempt, which I hadn't thought of before, but it seems to me that it fails pretty clearly because of the vice in the cross-licensing in the Line case was an agreement between the two where the right of the owner of the Schultz patent to fix prices was ceded by a contract to the owner of the Lemmon patent.

Now, there is no indication that the same result would have followed had the form of the transaction been a purchase. It seems to me you have to take that hurdle before you say that our buying the "starch" patent was bad under the Line case, because it resulted in our being able to fix prices in patent owned by somebody else.

Well, the fact is that there was a transfer of title and [fol. 187] a purchase of the patent. We got it and owned it, and we fixed the price as owner.

Now, conceivably if the evidence—and there is some in the record today—established convincingly that that purchase was made pursuant to this broad general consiracy to continue price fixing indefinitely or beyond the expira-

tion of the Utzman patent, that the purchase would violate the Sherman Act; but one of the things we want to prove—and, again, there is some evidence of this in the record—is the circumstances under which we bought the "starch" patent.

I said the other day that it is inconceivable that the Sherman Act would have been violated if in the Gypsum situation Mr. Haggerty, the inventor, still owning the patent let us assume, had made a will and left it to the Gypsum Company and then died. It is inconceivable that any court would hold that the acquisition in such circumstances of the "starch" patent by us would have violated the Sherman Act. What we want to prove here is, from our side—from the United States Gypsum Company side—the circumstances surrounding our purchase of that patent. Those circumstances have already been partially described by the witness Holland and they are, in brief, that we found ourselves in a most embarrassing position at the time we were offering the "bubble" license and were being accused by Holland of a gross and wilful and wholesale violation of his patent rights at the time we were sternly admonishing [fol. 188] our competitors that they were bad boys because they didn't observe ours; that, due to the fact that the Universal Company was in receivership and needed the money, our prime purpose and our only purpose was to relieve ourselves as cheaply as we could of a claim Universal had against us for infringement of the patent, and we bought the patent for that purpose, and it wasn't until afterwards that we realized we had a product patent under which as owners we could fix prices because of its fundamental nature as a product patent.

I say, again, that even if Mr. Steffen's theory had some merit—which I do not believe—that it merely emphasizes my contention that we should have an opportunity to show the nature of the purchase and the reasons therefor in order to rebut the presumption that it was analogous in purpose and effect to a cross license such as was involved in the Line case.

Now, so far as his comment on our offer of proof is concerned, he seems to reject, as entirely immaterial, intent, purpose and agreement. He says we shouldn't be heard

because under the Supreme Court decision it is utterly immaterial for us to show there was no agreement, there was no intent, and there was no purpose. He classifies into three classes all of our offers.

Now, as to those which he says are already in, the very first one he puts in that class, No. 4, says:

> "At all times the licensor was willing to license [fol. 189] any one manufacturer without regard to whether or not a license was taken by any other manufacturer or manufacturers."

Well, it is in to some extent. If he concedes it, that is another thing, but it is not in with that degree of definiteness, it is not in from any witness representing the licensor or connected with the licensor, and that comment can be made, I think, of every one of the offers that he puts in that class.

It has been necessary in many of these offers for us to repeat, simply for the purpose of making our offers understandable, some such things as that there were licenses and that they were taken on certain dates, but in each instance the offer, when read as a whole, contains some few facts not in the evidence at all or not conclusively and definitely established by the evidence, and we have not intended to repeat anything that is established by the evidence.

So far as the second class is concerned, "of no intent or purpose," the first one that he lists is No. 5, and it seems to me that the soundness of his contention can be tested by that one in which we offer to prove that our sole interest in bringing suits and in settling them and in offering and issuing licenses and enforcing them was to secure the full benefits of our patents and not to enter into a plan such as the Supreme Court has said has been established prima facie against us.

[fol. 190] So that it seems to me in that sense, intent or purpose is material, and I do not at all mean to suggest that unlawful price-fixing is unlawful only if there is an unlawful intent. I don't mean to trespass on that ground. I quite agree that if you fix prices, it doesn't make any difference what your intent is. But if you are charged with entering into a conspiracy, I think it does make a difference

as to what your intent is—certainly, in the sense in which I have been construing conspiracy, as I believe the Supreme Court has defined it in that part of the opinion to which I referred.

Chief Justice Stephens: Didn't the Supreme Court say somewhere in the Gypsum opinion that the motive with which the contracts are entered into is immaterial?

Where was that?

Mr. Bromley: That is on page 27, in the middle of the page, I think, "We conclude"—page 27, a little more than half way up:

> "We conclude that regardless of motive, the Sherman Act bars patent exploitation of the kind that was here attempted."

Chief Justice Stephens: Let me see what context that is in. Do you think, there the Supreme Court is not using the word "motive" in the sense of "intent", in view of the context in which it is being used?

Mr. Bromley: I don't know that I can answer that ques-[fol. 191] tion. My view of that sentence is that where you have a conspiracy as broadly defined—that is, the Supreme Court says:

> ". . . the trial court found that there was no agreement among the defendants"—to do all those things, and that—"The court further held that as to all charges except the last two the defendants would have been acting within the scope of the patent grant even if they had agreed to do the things charged. We conclude that regardless of motive, the Sherman Act bars patent exploitation of the kind that was here attempted."

I think all they mean is that in their view there was a conspiracy and it doesn't make any difference then what the motive for it was.

But I can't be clear about that, because they go on to say:

> "The license agreements and the bulletins establish the conspiracy . . . With the conspiracy thus fully established, the declarations . . . become"—binding.

"We think that all of the declarations and acts . . . are in aid of the ultimate conspiracy."

I think all that means is that assuming you have got a broad conspiracy which is made up of the agreements, the price bulletins, plus the declarations, and if you conclude there was such a conspiracy, then motive with which it was [fol. 192] undertaken is immaterial.

But I still say that in determining whether there was any conspiracy, the intent with which the licenses were issued is material.

Judge Jackson: That intent is a matter of inference, isn't it, rather than any expression, any inference, from facts?

Mr. Bromley: It is a matter of inference, but I think it is susceptible of proof from the licensor. For instance, if he testified that he got a patent and offered it to the world and did nothing else, never conferred with anybody about what he would or would not do, I think that is material evidence to rebut the charge which may flow from the execution of the licenses themselves, that he entered into a conspiracy and violated the Sherman Act. I think he is entitled to explain his conduct and his position as rebutting the charge that he entered into an unlawful arrangement with his competitors which he carried out by means of license agreements.

Chief Justice Stephens: We will take a 15-minute recess.

(Recess 3:30 p. m. to 3:45 p. m.)

Chief Justice Stephens: Have any of the defendants a desire to be heard, other than through Mr. Bromley?

(No response.)

Chief Justice Stephens: If not, we will hear from the Government again.

[fol. 193] Closing Argument on Behalf of the Plaintiff

By Mr. Steffen:

Mr. Steffen: If your Honors please, I don't intend to take very much time.

Chief Justice Stephens: You have 30 minutes left, if you want to use it.

Mr. Steffen: I want to say just one or two things in regard to the proffer. I don't know that we will take an exception, your Honor, but I might point out that there is no affidavit presented and really no issue of fact. I do that for the purpose of getting the matter clear before the Court.

Under Rule 56, if the defendants wish to raise an issue of fact, they must submit an affidavit. The proffer is, of course, informative, but it is not probative proof.

Chief Justice Stephens: Have the courts ruled that they must submit an affidavit?

Mr. Steffen: No.

Chief Justice Stephens: I thought the rule said they may.

Mr. Steffen: They may or may not, but if they don't, in the circumstances of this case, we have a prima facie case and nothing to the contrary. Technically, therefore, we would be entitled to judgment without argument one way or the other.

Then, I want to point out further that both National and [fol. 194] Ebsary, while they have joined in the objection, they haven't put in anything. They don't even join in the proffer of proof—with the result that here we stand with an admitted prima facie case and they say "We object", but they don't put in anything at all upon which your Honors can rule.

Chief Justice Stephens: Is counsel for National here? Who is counsel for National?

Mr. Knuff: Mr. Chase was here this morning.

Chief Justice Stephens: I thought he said National did join in the offer of proof.

Mr. Steffen: He joined in the objection, your Honor, but did not join in the proffer.

Chief Justice Stephens: Did he expressly say he did not join in the proffer?

Mr. Steffen: That is correct. I think that is correct, your Honor.

Mr. Bromley: I thought he said he stood on his answer.

Mr. Steffen: This has been passed upon, I should assume

there is no proof at all. Allegations in an answer are not facts for the purpose of weighing an issue at this time.

Chief Justice Stephens: I am not quite sure of that. I am not sure we can compel the defendants to make a proffer.

Mr. Steffen: No, I think not.

Chief Justice Stephens: We invited them to do so, in order that we might, if possible, clarify the issues in this [fol. 195] case. On a motion for summary judgment, if a defendant can make out that the issues raised by his answer are genuine and material issues, would he not be entitled to a trial even though he doesn't make a formal proffer?

Mr. Steffen: He wouldn't need to make a proffer, your Honor, but he would have to put in an affidavit to support the position he had taken, and the cases, I think, are clear that a mere allegation in an answer, or even mere argument of counsel, is not proof, and you are now weighing the facts.

We have got a prima facie case—the defendants not putting in other facts in provable form by way of affidavit ordinarily.

Chief Justice Stephens: Of course, in Federal practice an opening statement, if sufficiently explicit and detailed, can be treated by the court as an outline of the defendant's case or the plaintiff's case, either one. The court can act. If the court, at the close of the opening statement on the part of plaintiff's counsel, feels that no case has been shown, it can dismiss the case. The same thing with respect to the defendant's opening statement.

Although the power isn't so frequently exercised, I do know of cases in which it has been exercised in the case of defendant's opening statement. I thought what Mr. Bromley was, in effect, making this morning was a kind of opening statement for the defendants. However, go ahead.

Judge Garrett: Let me see if I understand it. You mean [fol. 196] that this proffer of proof should be sworn to?

Mr. Steffen: Substantially that, your Honor; and I am merely raising it——

Judge Garrett: And there should be an affidavit, if given the opportunity, that it would prove so and so.

Mr. Steffen: That is right, and I brought it up simply so the Court would see just the technical position that we are in.

Chief Justice Stephens: Just a minute. Let me send for the Rules of Civil Procedure. Maybe you have them here.

Mr. Knuff: I have them here.

Chief Justice Stephens: I have them in my portfolio in the next room, but maybe you have them more convenient. That is the old rule. "Rule 56:

> "The adverse party, prior to the day of hearing, may serve opposing affidavits, but the judgment sought shall be rendered forthwith, if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law."

Proceed, Mr. Steffen. We will determine these matters later.

[fol. 197] Mr. Steffen: I want to make just one or two points. I am going to refer to one or two of the proffers for purpose of illustration. I will refer first to item 4. Item 4 reads:

> "At all times the licensor was willing to license any one manufacturer without regard to whether or not a license was taken by any other manufacturer or manufacturers."

We stated that that came in the first category and presented no material issue. In other words, assuming that U.S.G. was willing to license all—in fact, we contend that they would not only license all but did license all of the manufacturers, and, therefore, we do not think that that really is very material, taking it as it is.

Now, the more important point that perhaps I should refer to is the matter of Proffer 1. Proffer 1 says:

> "There was no agreement or understanding between the United States Gypsum Company . . . , patentee, and the other defendants or any of them that they would associate themselves in a plan to blanket the industry under patent licenses and stabilize prices or

issue or cause to be issued substantially identical licenses to all of the defendants or any number of them."

Now, our position is, as we stated, I think, this morning, that what you have to show is brought out in the Masonite [fol. 198] and in the Interstate Circuit case, that the parties have associated themselves, by way of concert of action and being erstwhile competitors and covering the entire industry, in a plan or in a scheme or in a course of action—I said that many times this morning—the natural result of which is to result in restraint of trade.

This morning I clearly said, or tried to say, that for purposes of this action, this motion, we can limit our case to price control. The facts are admitted on that point alone.

The matter of whether or not these defendants did associate themselves in a plan, if you wish, to standardize or to stabilize prices throughout the industry is sufficient to make out a conspiracy in restraint of trade.

Price fixing alone is per se illegal.

The Supreme Court has said that this is not protected under the General Electric case. You have a combination. The plan—Of course, they never sit down and say, "Now, we will do it according to a particular plan." The plan is what you find as the course of action, what they were doing. As Mr. Justice Jackson said, you infer from what they have done, and it gets so loud, the inference, where they have all fixed prices for a period of 19 years or some such matter, that you won't hear them say, "Well, we didn't have any plan to do what we did," or as Mr. Justice Hand said, "Monopolists do not monopolize unconsciously." Those [fol. 199] things, I think, are so clear that no evidence is in point.

Now, take this case. Mr. Bromley would call Mr. Avery. I don't know what he would ask him, but in the case of licensing the whole industry he did fix prices throughout the whole industry. If he were to ask, "Well, did you have any plan to fix prices throughout the industry?", what in the world would that do? Suppose he said, "No", which is the most he could say, what in the world would it prove? They did fix prices throughout the industry, they did li-

cense the entire industry, they did get rid of jobbers—and that is admitted—they did all of the things that are not denied or not brought out in this proffer, such as to have dunnage, to have their various trucking areas, the size of trucks, and everything that has gone on—that is all admitted today. They have not offered in their proffer anything to controvert it.

Now, that is regimentation of an industry. All those admitted facts. Now, what can Mr. Avery say? He can say, "I had no plan." It would be a stupid thing to have to listen to Mr. Avery say he had no plan. What difference would it make whether he had a plan when the whole industry did do it? They all came in, and, moreover, Mr. Bromley admits they all knew they were coming in, in the summer of 1929. They talked over the licenses. At the May meeting they were handed out price control bulletins with all the details. They knew what the price control feature [fol. 200] was, and that same feature came in, in November, the moment they got into the other licenses. They knew the regimenting scheme. They all came in.

I, therefore, say that under their Proffer No. 1 that Mr. Avery might testify that there was no agreement or understanding, is entirely immaterial.

You can say the same thing with his offer in regard to jobbers. He wants to show, he said, that they didn't intend to eliminate jobbers. Well, whether they intended to or not, they did.

He says he would be able to call the U.S.G. officers and have them tell what they intended to do. Well, the fact is they did eliminate jobbers.

He said he would like to ask them if it wasn't their lawful right to fix prices to jobbers the same as to dealers. Now, that raises the question of law: Was it their lawful right to do that in the circumstances of this case? We would say the Supreme Court has said "No", that where you have all associated together, you are all fixing prices to jobbers the same as to dealers with the effect of eliminating jobbers from an industry, that you have, at that point, as soon as you know that everybody is adhering to that same plan or course of action, a conspiracy which results in a restraint of trade, and it is illegal.

Now, — perhaps should say one point with regard to the Line Material argument that we advance. I think that the [fol. 201] argument is very clear.

Mr. Bromley says that it is not unlawful, that the illegality was in the acquisition of the two patents.

He points out: Suppose Haggerty had made a will and given the "starch" patent to U.S.G., would that have constituted an unlawful act?

Well, the vice in the Line Material case—and he read from the opinion—was that the manufacturers all combined under common license agreements to fix prices. The Sherman Act isn't directed and doesn't in terms say it is unlawful to take two patents and combine them. The Sherman Act says that it is unlawful to combine and fix prices, and the whole gist of the Line Material opinion was to say, "And the G.E. case does not protect you where you have combined patents and are fixing prices beyond what they have said in the G.E. case."

[fol. 202] The Line Material case, therefore, is right on all fours with the Gypsum case as respects the combination of manufacturers, their taking out common licenses, their fixing prices, and so on; but the immunity they thought they would get under the G.E. case the court said was gone for the reason that the G.E. case nor no other opinion of the court had gone so far as to say that you could combine those two patents and then fix prices on the combined products.

They could, of course, not have made that point. They could have made the point that just the combination alone, as they said in the G.E. case, where you have regimented an entire industry, that the rewards go beyond anything you are entitled to have by virtue of your patent; but in the Line case, as we point out in our brief, they said the G.E. case is, moreover, also obviated by the fact that you combine competing patents, put them in the hands of one owner, and then fix prices on the basis of that.

There is no immunity by virtue of the G.E. case for that sort of combination. I think our record is pretty clear that the "starch" patent and the "foam" patents are competing. They say so right on their face. It makes a lightweight board. They were put in the hands of one manu-

facturer. The result is that they were fixing prices on the basis of a combination of products.

Now, in other words, what Mr. Justice Reed was doing [fol. 203] and the majority was doing was saying that, "Well, granting that under the G.E. case the licensor may fix prices of his single licensee on a patent, if he has combined and obtained competing patents and then fixes prices on the two of them, that that goes beyond the G.E. case in itself."

The Gypsum case goes beyond the G.E. case if you regiment the whole industry.

The rewards are not normally and reasonably adapted, as the court very specifically says.

So that we feel there isn't really any disputed questions of fact or any genuine issue of a material fact in the case. There is no question at all that the provisions as to intent—you don't have to show, as the court has been saying for 30 or 40 years, that the defendant intended to do what they did. You don't have to show that they had a specific purpose to do what they did.

We say that when you come to show how a conspiracy is proven, you don't have to show that they had any preliminary agreement whereby they did what they did.

Chief Justice Stephens: How can you show a Sherman Act conspiracy without showing intent? You don't have to have overt acts, as I remember it, under the Sherman Act.

Mr. Steffen: No.

Chief Justice Stephens: You have to have intent. Doesn't intent have to exist for conspiracy under the Sherman Act? [fol. 204] Mr. Steffen: No, it is concerted action, and in the patent case, which as I recall was a series of coal contracts—maybe I have the Reading case and patent case mixed—but a series of contracts each of which individually was all right, but where they were combined then you had a monopoly or undue control over an area of the coal industry. The court said, "Well, whether they intended to get undue control over the industry or not is immaterial." They did get it.

As Mr. Justice Douglas in the Paramount case said, "If

you had to go back and prove what after all is a mere matter of form where the real vice is what they did—"

Chief Justice Stephens: Of course, I read with great humility anything from my own opinion at this stage of the proceeding, but I said there among other things—for the convenience of the reporters I am reading from page 106 of the defendant's print of the opinion of the Trial Court in this case, page 451 of the Federal Supplement:

> "Certain other principles relating to proof of such charges as are involved in the instant case should be stated: A conspiracy is a partnership in the accomplishment of an unlawful thing, or of a lawful thing by unlawful means"—citing authorities—"Under the Sherman Act a conspiracy need not involve an overt act, although the commission of such an act or acts may tend to characterize a conspiracy in respect of time and [fol. 205] place. The 'Sherman Act punishes the conspiracies at which it is aimed on the common law footing—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability.'" Then citations are given. To continue:
>
> "As stated in the latter case 'Conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done and from the circumstances.' Evidence as to conspiracy is, of course, to be considered as a whole—not piecemeal."

It is true, of course, that you may not be able to prove intent by direct evidence, but unless you are aiming at proving an effectuated conspiracy to condemn the overt acts which result from it, haven't you got somewhere in the ambit of your proof, either by direct proof or by inferential proof or circumstantial evidence, to show that there was an intent either to do a lawful thing by illegal means, or to do an unlawful thing?

Mr. Steffen: I don't want to be understood to say——

Judge Jackson: Isn't it a kind of aphorism that everybody is presumed to intend the result of his own act?

Mr. Steffen: That is right, and will not be heard to say the contrary is what the court said.

Chief Justice Stephens: That is true, but still that doesn't

eliminate the fact that you ultimately have to find intent, [fol. 206] so that intent is still an issue in the case, isn't it? That goes to the method of proving intent.

Mr. Steffen: Well, Your Honor, if they won't hear you say the contrary, then it is scarcely an issue in the case. I would cite you again in our brief the language of the court in the Griffith case, which I think is very clear:

> "It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements . . . To require a greater showing would cripple the Act. As stated in United States vs. Aluminum Company of America . . . 'no monopolist monopolizes unconscious of what he is doing.' Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act."

I have no further argument, Your Honor.

Chief Justice Stephens: Mr. Bromley, I would like to hear you on this point that you are required in order to make a binding proffer to file an affidavit. What do you say about that?

Mr. Bromley: In the first place, the plaintiff's motion for summary judgment is made upon the pleadings and the [fol. 207] proceedings, including the testimony and the exhibits of the admissions by counsel.

Now, my position was that since the Government has moved upon the testimony and the exhibits, that I wouldn't even have to make an offer of proof.

Chief Justice Stephens: Does it also move upon the pleadings, did I hear you say?

Mr. Bromley: Yes, sir.

Chief Justice Stephens: Very well.

Mr. Bromley: And that since they proffered to the Court both sides of the question, not only the complaints but the answers, not only the direct examination but the cross-examination, not only the testimony but the exhibits, and

have proffered to the Court the whole thing, there was nothing for me to do except adopt the basis presented and say on the facts that they present thus as a matter of law the motion cannot be granted.

I didn't feel that I had to come in here and make an offer of proof supported by affidavit or make any showing by affidavit. I was willing to accede to the request that I do so in order to assist the Court in indicating what it was that I had in mind, but I felt I could have just as well indicated that on the argument without any offer of proof, that it was apparent from the nature of what the Government proffered here—that is, the testimony and the exhibits.

[fol. 208] Chief Justice Stephens: I want to ask you one other question, Mr. Bromley.

Turning to the Supreme Court opinion in the Gypsum case, at page 24 in the second paragraph the Court said:

> "If the District Court had thought that a plan such as is evidenced by the license agreements and the bulletins was illegal under the Sherman Act, it might have had a different conclusion on the question of the admissibility of the declarations of some appellees against all. Its position stemmed logically from its understanding of United States vs. General Electric Company"—giving the citation.

Then it puts in a footnote, which is a quotation from my opinion for the Trial Court in the Gypsum case, which says:

> "To the District Court the General Electric case establishes 'that a patent license agreement granting the right to make, use and vend a patented product, under terms and conditions, including prices, fixed by the licensor, is lawful. Such a license agreement ordinarily, and, when the prices are (as in the General Electric case) a part of the license contract, necessarily, involves negotiation and discussion between the licensor and the licensee and agreement upon the terms and conditions, a purpose to execute and carry out the agreement, combined action in signing the agreement [fol. 209] and in performing the obligations thereof,

with knowledge that it will result in a stabilized and presumably profitable price for the patented product as between the parties and in the industry (since the parties are, by virtue of the patent, the only ones having a right to make, use and sell the superior patented product) and with knowledge that it will result in a monopoly (i.e., a divided patent monopoly), in probable discontinuance of manufacture and sale by the licensee of inferior materials (the licensee's incentive to take a license is the right to make the superior product), and in control of distribution. What a lawful patent license agreement normally involves cannot be unlawful. Additionally, since a patent owner may lawfully divide his patent monopoly with a plurality of licensees, there will in the usual course be with each of such licensees the same negotiation and discussion, agreement upon terms, purpose to execute and carry out a license contract and to accomplish its normal results, and combined action in so doing, as in the case of a single licensee. And each licensee will be informed of and discuss with the licensor the terms and conditions of the proposed licenses; otherwise no more than a single license could be executed. A patent owner would not be able to license competing manufacturers upon different price terms; no one such would be will-[fol. 210] ing to suffer competitive disadvantage; no one such would be willing to sign in the dark as to the terms to be extended to the others; ordinarily, moreover, there will be discussion at large, i.e., within the trade, of the advantages and disadvantages of the licenses proposed by the patent owner. Each of a plurality of licensees will, moreover, have the same purpose to take a license and to secure its resulting advantages. The licensor and each licensee of such a plurality constitute "combination" to effectuate the purposes of their license. Since a plurality of licenses is lawful, all of this must be lawful. Further, if in practical effect the licensor and the plurality of licensees are a "combination" to the same end, such a "combination" is not stigmatized by the law—provided in purpose and effect it does not secure to the patent

owner more than the normal reward of a patent monopoly, nor to any of the licensees with whom the monopoly is divided more than the advantanges which naturally result to a licensee, as well as to a licensor, from patent licensing. All of this necessarily follows from the General Electric case.' "

Now, after having quoted that in its opinion, the Supreme Court goes on at the top of page 25 and says:

[fol. 211] "The opinions in No. 8, United States vs. Line Material Company, decided today, whatever may be the different views expressed, make clear that the District Court's interpretation of General Electric differs from that of this Court. With its interpretation of the rule of General Electric, the District Court was not required to balance the privileges of United States Gypsum and its licensees under the patent grants with the prohibitions of the Sherman Act against combinations and attempts to monopolize. Conspiracies to control prices and distribution, such as we have here, we believe to be beyond any patent privilege."

Now, why is not that an express holding by the Supreme Court that a plurality of licenses, a mere plurality of licenses, is illegal, with price-fixing provisions? That has puzzled me in reading this opinion, especially when I contrasted it with what you yourself have emphasized. The Supreme Court said in a later part of the opinion at page 27:

"The Trial Court made findings of fact which if accurate would bar a reversal of its order. In Finding 118 the Trial Court found that the evidence 'fails to establish that the defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize prices.' "

Those two parts of the opinion seem to be inconsistent [fol. 212] with each other. In the one which I first read, it seems arguable that the Supreme Court was holding that a plurality of licenses is illegal, but here the Supreme Court says that if our findings were accurate—and it mentioned particularly Finding 118—the reversal of its order would

be barred, which would seem to indicate that a plurality of licenses is not illegal.

What do you make of that? Can you help us, either of you?

Mr. Bromley: I had always interpreted the statement on page 24 as merely the enunciation of the doctrine that the license agreements and the bulletins were sufficient prima facie proof to justify the reception of the admissions against everybody.

I have also thought that the sentence on page 25 misinterpreted what was stated in this Court's opinion completely because I saw no evidence of any failure to appreciate that the privileges must be balanced with a proper regard for the Sherman Act and the patent law.

Chief Justice Stephens: Well, that is certainly true because we carefully pointed out that the operations under the agreement must not go beyond the proper limits of the patent monopoly and into the field covered by the Sherman Act, and we thought that they had not.

Mr. Bromley: Furthermore, I think you expressly refer to the fact that you had a conflict and had to balance what [fol. 213] could be done under the one and what was prohibited under the other.

Chief Justice Stephens: Do you agree with me that those two parts of the opinion that I have referred you to are apparently inconsistent, when it says, "In Finding 118 the Trial Court found that the evidence 'fails to establish that the defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize prices' "?

When the Supreme Court says that and says that if we could make a different finding on that subject accurately, it would bar reversal, it means to hold that a mere plurality of licenses is not necessarily illegal?

Mr. Bromley: Yes, sir, and I think also you cannot disregard what is said on page 34 and page 35, at the bottom of 34, where I said before and say again that I think they there state what they think the conspiracy was that was established prima facie.

May it please the Court, going back to page 24, that sentence, "If the District Court had thought that a plan such as is evidenced by the license agreements and the

bulletins was illegal under the Sherman Act, it might have had a different conclusion on the question of the admissibility of the declarations . . .", that is what they are talking about—admissibility of declarations.

Now, I confess that I have always thought that it was [fol. 214] clear law that in order to make declarations admissible, you didn't have to prove an unlawful conspiracy by evidence aliunde, and I say that because as I understand the Hitchman case—and I can't remember now whether Your Honor accepted this in the opinion or not—as I understand the Hitchman case, it was sufficient to prove that there was a combination, that is, to organize the mines.

Chief Justice Stephens: We did hold in addition to that that you couldn't prove one combination and then, resting upon that, prove something different by way of the full conspiracy.

Mr. Bromley: By means of the declarations.

Chief Justice Stephens: By means of the declarations.

Mr. Bromley: I think that is right.

Chief Justice Stephens: I do think it is to be noted, gentlemen, that in this part of the opinion on page 24 the Supreme Court was talking in terms of whether or not there had been established sufficient evidence of a conspiracy independently of the declarations to warrant considering the declarations binding upon all. Perhaps, therefore, the Supreme Court was not intending there to rule definitively upon a question of the legality of plurality of licenses.

Mr. Bromley: I think that must be the explanation.

Chief Justice Stephens: Mr. Steffen, do you have anything that will help?

Mr. Steffen: I would like to say just a word. I think [fol. 215] there is no necessary inconsistency at all in the two provisions and with the greatest respect I say that I think the Supreme Court when it set out very carefully the theory upon which this Court construed the General Electric case and said that it disagreed with it, that it was passing then definitely upon the law of the case. Of course, it would have to do that for purposes of determining the effect of the declarations.

But what they were saying was that even though all of the matters that were listed in this footnote were found,

still that that doesn't reach the position of this Court and that this Court says that the conspiracies to control prices and distribution such as we have here—or, in other words, such as Your Honor had listed—we believe to be beyond any patent privilege.

Now, when you come to four over on page 27, the Trial Court made findings of fact which, if accurate, would bar a reversal of its order, and referring to Finding 118, I don't see any inconsistency. If you read Finding 118, it is as broad as all outdoors, and if that finding were to remain—that is, that there was no combination among erstwhile competitors—let me read it:

> ". . . the evidence 'fails to establish that the defendants associated themselves in a plan to blanket the industry under patent licenses and stabilize [fol. 216] prices' ", as charged by the Government.

You see, that is extremely broad. It had to be upset. That is, if the Court was to do anything at all. The Court in this part of the opinion is merely explaining how Your Honors reached the position that you did and saying they disagreed with the basis on which you reached it and then saying that as they looked at the evidence that 118 can't be sustained.

That cleared the path then for them to say in the fifth part of their opinion over on page 33 what they thought the law was, and then they rather explicitly say there that it will be sufficient to show that defendants, and so on, as I see it.

Chief Justice Stephens: We will take a recess for ten minutes, gentlemen, and reconvene and, if possible, make some announcement as to when we can reach a conclusion upon this motion for summary judgment.

(Recess: 4:27 p.m. to 4:47 p.m.)

Oral Ruling on Motion for Summary Judgment

Chief Justice Stephens: The Court thinks it need give no further consideration to the motion for summary judgment than it has thus far given. It has heard the arguments and considered them carefully and has read the prof-

fers and various other papers presented and is ready now to reach a decision.

The Court is in division on the motion for summary [fol. 217] judgment. Judge Garrett and Judge Jackson have different views from those of myself, and I will ask them each to state briefly their views, and then I will state mine.

Judge Garrett.

Judge Garrett: I have studied the proffers of proof very carefully in the light of the motion for summary judgment and in the light of the argument made in the briefs.

It is my opinion that if everything should be testified to, which is in the proffers of proof, it would not bring any change in the decision of the Supreme Court on the fundamental question involved.

I do not care to go into any detail about the matter. Of course it is very well known my judgment was different originally, but the Supreme Court has spoken, and I am unable to see wherein there is any loophole through which there may be a conclusion different from that reached by the Supreme Court upon the fundamental questions.

Hence, I think the summary judgment should be granted, but I take the precaution to say that the decree following the summary judgment, if it comes or when it does come, must be examined with great care because it should not include matters which were not in issue before the Supreme Court.

That, I think, is all that I have to say.

Chief Justice Stephens: Judge Jackson.

Judge Jackson: Judge Garrett's reasoning parallels mine. [fol. 218] I, too, feel that if everything were proved by witnesses on the stand that is stated would be attempted to be proved in the proffer of proof, that still there would be no genuine issue of a material fact. There is no sense in going to great length to explain my view. I agree with Judge Garrett. I have read very carefully the briefs, listened with attention and an open mind to the arguments, but I just can't understand how I could come to any other conclusion in view of the decision of the Supreme Court.

Chief Justice Stephens: I have a different view from my colleagues. I think the same issues—geninue issues of

fact—which were in the case at the outset are still in the case—the issues which arise from paragraphs 44, 45 and 46 of the plaintiff's complaint and from the defendant's answers denying the allegations therein.

I think the opinion of the Supreme Court clearly contemplates further proceedings in this case. It says on page 33 of the slip opinion just above Topic V:

> "It may be that in the light of this opinion the District Court will conclude that many such findings are no longer significant in reaching its decision. As to others a different result will be required. Enough has been said as to the findings and the evidence, we think, to enable the District Court to pass upon the facts that may come before it on further proceedings [fol. 219] in accord with our present ruling."

That, I think, is a clear indication by the Supreme Court that further proceedings were contemplated by it to be held by the Trial Court.

As to the balance of the opinion of the Supreme Court, while it is difficult to be clear as to just what it means on the topic of legality or illegality of a plurality of licenses, I cannot bring myself to believe in reading the opinion several times carefully that the Supreme Court has intended to rule that a mere plurality of licenses with price-fixing provisions is illegal.

I think, therefore, that the Supreme Court would not warrant our denying the defendants a right to try to prove that that was all there was in the instant case.

I do not see how we can assume to say that the defendants will not be able to prove to the satisfaction of this court the correctness of the findings of fact which it has already made. Putting this otherwise, I think the whole of the opinion in the Supreme Court must be read in the light of the proposition that the Supreme Court was passing only upon the question whether or not a prima facie case had been made.

I do not think it intended to rule that a complete case had been made. If so, it would itself have ordered a decree. I think the defendants are entitled to try by introducing evidence to convince the triers of fact that the allegations

[fol. 220] in paragraphs 44, 45 and 46 of the complaint are not true.

I think that to grant summary judgment at the present stage of the case is to deny to the defendants the guarantee of the due process clause of the Constitution of their day in court on the issues raised by their answers.

I do not think the Supreme Court contemplates any such denial.

That states my views briefly.

With respect to a decree, since I am now in the minority, I shall have to defer to the views of my fellows as to this suggestion.

It occurs to me, Mr. Steffen, in view of the victory you have now so fully won, that you might be able to content yourself with a decree which reflects the views of my colleagues on the subject of conspiracy to execute and take patent licenses for the purpose of organizing the industry and stabilizing prices, and on the subject of monopoly, and that you might not need to trouble yourselves or this court with the difficulties about jobbers and high prices and arbitrary prices of the patented board or with respect to unpatented materials or with respect to standardization or with respect to manufacturing distributors.

I should think you might be able to waive those points, if you get a decree, which you will now get, holding the entire licensing system illegal.

[fol. 221] Now, of course, we can't compel you to do that, but I suggest that as a matter for your consideration; and if you come to a different conclusion, then I think my colleagues will have to meet the issue of how they are going to draw a decree on those five topics which are the subject of paragraph 45 of the complaint without a hearing granted to the defendants on their denials of the charges on those subjects.

Mr. Steffen: If Your Honors please, we will be glad to have possibly 90 days in which to study over the matter of the findings and also to take up in some measure the nature of the proposed decree. We do not want to hurry in this, and we would not like to be pressed to agree now to any particular findings, but after studying it thoroughly, we will then, as in the last case, submit——

Chief Justice Stephens: I wouldn't suggest a present

commitment, of course. I do have this to suggest: while I disagree with my colleagues in their views, I think one of the practical results of their views, which may be desirable, is that if the defendants see fit, as I assume they will, to appeal from this ruling, we then may get a speedy determination by the Supreme Court as to what this opinion means on the subject of plurality of licenses and the legality thereof.

It would seem to me that it would be to the interest of the Government, which wants to stop what it claims to be [fol. 222] an illegal combination, to get its decree in here as soon as possible so that the defendants can proceed to appeal as soon as possible.

So I would suggest that you take as little time as is reasonably necessary for preparing a proposed decree.

Judge Jackson: Be sure that time is sufficiently long, though, so that some of us Judges can get out of this climate. I am not going to work this summer if I can help it. I am sick of it.

Mr. Steffen: We want at least 90 days.

Chief Justice Stephens: Is there any objection to 90 days for the preparation of the proposed decree, any objection by the defendants?

Mr. Steffen: Mr. Knuff says he would prefer 120 days. I might say this: that I am in charge of a case in New York against the Investment Bankers. I come here occasionally, and Mr. Knuff has been carrying the load and it will be largely his load over the summer.

Judge Jackson: Let us not fix a definite date, then, but get it out as conveniently as you can without killing yourselves, but have it accurate.

Mr. Steffen: That is right.

Chief Justice Stephens: It seems to me it would be better to set some time limit. If the defendants do not object, let's make it 120 days. Any objection by the de- [fol. 223] fendants to 120 days?

Mr. Bromley: No, Your Honor.

Chief Justice Stephens: Make it 120 days from today to present the proposed decree to the court and to adverse counsel.

Mr. Steffen: That is proposed findings of fact.

Chief Justice Stephens: Proposed findings of fact, de-

cree, or any other papers you feel you are obliged to have signed by the majority of the court under this motion for summary judgment and the granting thereof.

Does anyone think of anything else that ought to be disposed of at this time?

Mr. Bromley: May I have the last thing read that you said, Judge? I wasn't listening, I am sorry.

Chief Justice Stephens: I said that the defendants not objecting, the Government will be allowed 120 days from today within which to file with the Court and serve upon the defendants and their counsel its proposed decree, findings of fact, and/or other papers which it may feel itself under the legal duty of presenting in order to effectuate the ruling of the Court on the motion for summary judgment.

Mr. Bromley: I should like the record to show that I except to the ruling of the Court made this day.

Chief Justice Stephens: May it so show.

The court will be in recess until 120 days.

[fol. 224] (Whereupon, at 5:00 o'clock p. m. an adjournment was taken sine die.)

[fol. 225] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Holding a Three Judge Court

Civil Action No. 8017

UNITED STATES OF AMERICA, Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; Certain-teed Products Corporation; The Celotex Corporation; Ebsary Gypsum Company, Inc.; Newark Plaster Company; Samuel M. Gloyd, Doing Business Under the Name of Texas Cement Plaster Company; Sewell L. Avery; Oliver M. Knode; Melvin H. Baker; Henry J. Hartley, Frederick G. Ebsary; and Frederick Tomkins, Defendants

Reporter's Transcript of Conference of July 30, 1948

Conference Room, Court of Customs and Patent Appeals,

Washington, D. C.

Friday, July 30, 1948.

The above-entitled cause came on for the hearing of counsel and the announcement of the court's decision with reference to the proposed interlocutory order submitted by the plaintiff at 10:00 o'clock a. m., pursuant to notice, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

[fol. 226] APPEARANCES:

On behalf of the plaintiff:

Edward Knuff, Esq., Special Assistant to the Attorney General.

On behalf of the defendants:

Hugh Lynch, Jr., Esq., for the defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode.

Ralph P. Wanlass, Esq., for the defendant The Celotex Corporation.

James O'Donnell, Jr., Esq., for the defendants Newark Plaster Company and Frederick Tomkins.

George E. H. Goodner, Esq., for the defendant Samuel M. Gloyd, doing business under the trade name of Texas Cement Plaster Company.

John J. Courtney, Esq., for the defendant Certain-teed Products Corporation.

[fol. 227] PROCEEDINGS ON PROPOSED INTERLOCUTORY ORDER

Chief Justice Stephens: The record will show that the court is in session informally in the Conference Room of the Court of Customs and Patent Appeals for the purpose of hearing counsel with reference to the proposed interlocutory order and announcing the decision of the court as to whether or not to sign it.

Will the judges who are in the majority with reference to the motion for summary judgment please make such statement as you wish to make.

Judge Garrett: This motion for an interlocutory order took me somewhat by surprise because the court had adjourned on June 29 for 120 days at the request of counsel for the Government, agreed to by counsel for the defense, in order that a decree conforming to the decision of the Supreme Court might be prepared and presented. The court adjourned sine die that day.

So this motion for an interlocutory order came somewhat as a surprise. I don't know why it was presented, and before proceeding about this—we are proceeding quite informally, Mr. Knuff—I wonder why it was presented.

Mr. Knuff: I will be very glad to give you our thoughts on the matter, Judge Garrett.

The order was presented to formalize what the court informally said on June 29.

[fol. 228] Within the last year the Department has had the unfortunate experience of participating in at least two cases in which members of the court have unfortunately died before the entry of any formal order. I am referring particularly to Judge Bright's untimely death in New York in the Alkali case in which he was the sole judge, and he was

also a member of the statutory three judge court having hearings in the Paramount case.

None of us, of course, have any assurance that we are going to be here tomorrow, and I don't know what would happen in case of the untimely death of any member of this court. There would have to be another judge appointed. Now, whether that other judge would feel that this informal ruling from the bench would bind him is something I don't know.

We were somewhat in doubt as to just what would happen between June 29 and October 20, or whatever the 120-day period would be.

Judge Jackson: Or between now and next Monday.

Mr. Knuff: Or between now and next Monday. We don't know what would happen, and that is the reason for the order, Judge.

Judge Garrett: However good that reason may be, the order itself is not one that I am willing to sign. I don't think it is quite the duty of the court to point out the reasons for not signing it, but in a general way this causes this [fol. 229] Court to place itself in the position of reversing its own view upon facts. I don't think that it is ever required when a court superior in authority has reversed the inferior court—I don't think it is ever required that the lower court in writing a decree should be placed in the position of having reversed its own view on facts. The decree should be drawn in conformity with the Supreme Court's decision, and the responsibility for it should rest with the Supreme Court.

That is my view of what an inferior court should do. We bend, of course, to the authority of the Supreme Court. There is no question about its authority. However, we ought not to be placed in a position of saying that after our examination—we examined all these things before and we had a different conclusion about it. Another phase of it is—and I might say this now, because I hope another decree will be drawn: "and having concluded that the plaintiff is entitled to judgment as a matter of law in such manner as will effectively pry open to competition a market that has been closed by the defendants' illegal conduct"—well, what does that mean?

If I view it aright, if I understand this matter at all, if this combination or trust is broken up, so far as the record now stands the United States Gypsum Company will, of course, still own all these patents. No decree of this court upon the present state of the record can compel that Gyp- [fol. 230] sum Company to part with its patent rights.

So, I don't know how any decree of this court could pry open to competition a market for those products that are patented, the patents being owned by the United States Gypsum Company. That is that much of it.

Mr. Knuff: The language that was used there was taken almost verbatim from the language of Justice Jackson in the International Salt Company v. United States of America, decided on November 10, 1947. On page 8 of the slip opinion, the court says:

> "The usual ways to the prohibited goal may be blocked against the proven transgressor and the burden put upon him to bring any proper claims for relief to the court's attention. And it is desirable, in the interests of the court and of both litigants, that the decree be as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know their duties and unintended contempts may not occur.
>
> "The framing of decrees should take place in the District rather than in Appellate courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case. In an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific [fol. 231] illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints."

So, I took this language as almost a direct quote from Judge Jackson's language in the International Salt case.

Judge Garrett: That was in the opinion. Did you take it from the decree that was rendered in conformity with that opinion?

Mr. Knuff: I didn't understand.

Judge Garrett: That was taken from his opinion. Did you take it from the judgment or decree that was rendered in conformity with the opinion?

Mr. Knuff: I took it from the opinion.

Judge Garrett: We have to interpret these opinions as best we can.

Mr. Knuff: That is right.

Judge Garrett: The language, perhaps, is right there. I don't know—Were there patents involved?

Mr. Knuff: Yes, sir.

Judge Garrett: Nevertheless, whatever may have been the case there I don't know whether the same patent situation existed in that case that exists here.

Mr. Knuff: The facts of the case were not exactly the same.

[fol. 232] Judge Garrett: That is one reason, Mr. Knuff, why I am unwilling to sign this and these other reasons that I have already given.

I don't think I need go further into it. I am sorry, but I can't sign that. I would be glad to consider a decree that may be drawn here within the time we need fixed.

Chief Justice Stephens: Judge Jackson, do you wish to make any comment?

Judge Jackson: Yes. My thought is quite parallel to that expressed by Judge Garrett, but I would go further. I don't see any necessity for an interlocutory decree.

Of course, a judge may die, attorneys may die, anybody may die in the next minute or next five seconds; and I don't suppose there is any more likelihood that they are going to die in the period of 120 days than in a period of 120 minutes, as far as that is concerned.

I understand from a reading of Rule 56(c), I think you mentioned, of the Federal Rules of Civil Procedure, that it isn't mandatory upon the court at all, but that it may sign at its discretion.

I understand that the practice in the District somewhat varies here. Some judges sign two. My authority for this is Judge Stephens, who investigated the matter. In any event, I think that the record being as it is and our ruling having been as it was, and at the Government's request, [fol. 233] 120 days was given for them to present a decree

in any form, of course, that they may see fit—and that, of course, may be objected to by counsel for the defendants—that no purpose would be served in signing an interlocutory order such as has been presented here.

Therefore, I am of the opinion that the motion here should be denied without prejudice and may be renewed when the decree in 120 days has been formulated, filed, and served on counsel for the defendants, and then we can work it out. After all, it is going to be a decree of court and not a decree of counsel for the Government nor of counsel for the defendants.

I think that is about all I have to say about it.

Chief Justice Stephens: I assume you mean by your remarks, Judge Garrett, that you deny the motion for signing the interlocutory order without prejudice to the right of the Government to present an order of this sort in connection with the final decree.

Judge Garrett: Oh, yes. That may be done. Of course, my view on the matter is pretty definite.

Judge Jackson: It will be the decree of the court. We can strike anything we want or change it or write our own.

Judge Garrett: I would like to present this thought, if I may. Of course, an interlocutory order can't be appealed from. At least, that is the general rule. If we undertook [fol. 234] to lay down here what is in this court, you couldn't take an appeal from it, at least under the ordinary rules of practice. Am I right about this?

Chief Justice Stephens: I think that is right.

Judge Jackson: Under these very rules.

Judge Garrett: And so I think that a decree should be prepared that conforms to the decision of the Supreme Court according to such interpretation as we were able to give it, from which there could be an appeal taken if an appeal was desired to be taken by the defendants.

So, answering your question, Justice Stephens, yes, I have no objection to it being denied without prejudice.

Chief Justice Stephens: I, of course, voted against the motion for summary judgment, and am, accordingly, for the same reasons that I stated in respect of that vote on my part, not in favor of the signing of the interlocutory order.

I may say, however, in support of my colleagues who

constituted a majority of the court on this aspect of the case, that I think they are correct in declining to sign this interlocutory order.

So far as its phrasing is concerned, of course, that can be changed. It is simply a proposed order and when signed it will be the order of the court, and the court can rewrite it.

Rule 56(c), as amended, doesn't require the signing of [fol. 235] an interlocutory order but simply permits it. Moreover, the entry of an interlocutory order appears to be contemplated, under the rule, only in suits where the issue remaining to be determined is as to the amount of damages, rather than as to the nature and extent of injunctive relief.

At any rate, the rule is not mandatory, but is permissive. I think, therefore, Judge Jackson and Judge Garrett are exercising their discretion properly in declining to sign the interlocutory order, without prejudice to the right of the Government to present its decree at the end of 120 days. It was understood, of course, that the action of the majority, granting the motion for summary judgment, would be made effective in a decree, with right or argument on both sides as to its terms.

I may say that I have, in aid of my colleagues in respect to this, made inquiry with respect to the practice in the U. S. District Court. Some of the judges there apparently do sign two orders, Mr. Knuff,—an interlocutory order and a final order. Some of them sign only one. It appears to be the better practice, in the view of the majority, so far as I have been able to find out, to sign only one. I think that would be the better practice in a case of this sort.

[fol. 236] So far as the possibilities of death are concerned, that is something we all have to take a chance on, including the Government and the defendants and the court.

So far as the appealability is concerned, I think Judge Garrett is correct. I do not think the statute giving a right of appeal to the Supreme Court, from a decree of a three-judge court set up under the Expediting Act, contemplates right of appeal from an interlocutory order.

The defendants would, therefore, be in the position, if this decree were entered, of having a judgment entered against them, which might or might not have extrinsic

effects not contemplated by anyone, with respect to which they would have no right of appeal.

In view of the understanding and of the request of the Government for 120 days, it seems to me not quite fair to sign some interlocutory order in a lesser time and without any reasonable opportunity for discussion of its terms

So I think that the position taken by my colleagues as to the signing of this proposed order is correct although, as I say, I would myself decline to sign it for the additional reason, to-wit, I think the motion for summary judgment should not be granted. That, however, I have expressed myself on previously.

The record then may show that the presiding judge votes against signing the interlocutory order on the grounds [fol. 237] stated by him at the last session of the court in respect of the motion for summary judgment and that the majority of the court, Judge Jackson and Judge Garrett, decline to sign the order for the reasons which they stated, but they do so without prejudice to the right of the Government to present 120 days from June 29 a proposed final decree granting summary judgment and defining affirmative relief.

While we are present, I think I will take the time of those who are here to correct this record.

Before we do that, let us show who are present today.

I will call the roll of the parties.

Mr. Lynch is here representing U. S. Gypsum.

Mr. Lynch: Yes, sir.

Chief Justice Stephens: National? Is National being represented today by anyone?

Mr. O'Donnell: Mr. Chase is out of town.

Chief Justice Stephens: Certain-teed?

Mr. Courtney: I am appearing on behalf of Mr. Ogburn.

Chief Justice Stephens: In place of Mr. Ogburn for Certain-teed?

Mr. Courtney: That is right.

Chief Justice Stephens: Celotex Corporation?

Mr. Wanlass: Yes, sir.

Chief Justice Stephens: Ebsary?

(No response.)

[fol. 238] Chief Justice Stephens: Newark?

Mr. O'Donnell: Newark and Frederick Tomkins.

Chief Justice Stephens: Samuel Gloyd?

Mr. Goodner: Yes, George Goodner.

Chief Justice Stephens: And Sewell Avery is represented also by Mr. Lynch.

Mr. Knode by Mr. Lynch.

Mr. Baker by Mr. Lynch.

Hartley was connected with Ebsary, was he not?

Mr. Knuff: Hartley was president of Certain-teed.

Chief Justice Stephens: Tomkins has been mentioned.

In order to save time, since we are present, I have read this record, and I think we had better make these corrections while we are here. This is the record of the proceedings on June 29. The court has the following corrections to suggest:

Page 7941. I have these a little out of order. I discovered some of them on a second reading. Page 7941, line 4. This is a small point, Mr. Court Reporter, but the word "Court" should not be capitalized. The same thing is true in line 9. In line 15, the comma after the word "defendants" should be eliminated. Line 25. The word "Court" should not be capitalized, and a period should be put after "120 days"; and the words "so far as this case is concerned," being the last words on page 7941 and [fol. 239] the first words on page 7942, should be stricken as not pertinent, there being no other case before this court.

The court reporter shouldn't capitalize the word "court" except as applied to the Supreme Court of the United States. Wherever that is capitalized in judicial printing, it means the Supreme Court of the United States. It makes the record confusing to capitalize that word when it does not refer to the Supreme Court.

Page 7942 has been covered.

Going back to the beginning, page 7839, line 11, there should be a colon rather than a period after the word "upon."

Page 7840, line 2. The word "authority" should be in the plural, "authorities." Line 3, the word "we" should be changed to the word "he." Line 19. The first word "this" in the line should be stricken out—and also the comma—it has been printed twice. Line 22. The word "when" should be stricken. Line 23. The word "says"

should be changed to "holds" and after that there should be printed the word "that" with a colon, making it read "if it holds that:"

Page 7841, line 1. There should be a period after the word "more" and the word "because" should have a capital "B" at the beginning, and the word "the" should be the article "a."

Also back on page 7840, the quotation marks should be taken out in front of the words "The General Electric" in [fol. 240] line 24. I am not purporting to be quoting there.

Judge Jackson: And the end quotation marks?

Chief Justice Stephens: The end quotation marks on page 7841, line 6, should be taken out.

Page 7842, line 15. The words "question of an" should be stricken out so that the parenthetical phrase will read "(by which I assume you refer to the agreement to fix prices," etc. Line 18 of the same page where it says "to eliminate patented open-edged board," it should read "unpatented open-edged board." Line 19. The word "a," the last letter, should be stricken out. Line 20. The word "charge" should be "charged," so that it reads "and the agreement to fix the resale price of manufacturing distributors as charged) can easily be taken care of in a decree?" Line 21, after the word "those" the word "issues" should be inserted, which would make it read "How can we take care of those issues in a decree." Line 23. The words "the question or" should be stricken out, making it read "unless we reach also the conclusion."

Page 7851, line 15. After the word "you" the word "not" should be inserted. I said, "Are you not unavoidably thrown back." Line 17. There should be a question mark after the word "concert"; a capital letter on the next word "because." Line 19. After the word "licensed" at the end of the line, the word "one" should be written in, making it read "licensed one to manufacture." Line 25. [fol. 241] The word "a" should be written at the end of the line, so that it reads "Yet, the Supreme Court apparently does not condemn as a monopoly.

Page 7852, line 4. After the word "tungsten" there should be a period, and the word "and" following that should be stricken out and the word "the" should be capitalized, so you have a new sentence reading "The Supreme

Court apparently does not condemn", et cetera. Line 8. After the word "licensees" insert a comma. Line 12. The word "is" after the word "monopoly" should be stricken out. What was said was "The Supreme Court holds that monopoly not illegal"—"monopoly is not illegal" doesn't make sense. The word "is" should be stricken out. In line 14 there should be a period placed after the word "illegal", and a new sentence commencing "But it apparently holds". Line 18. There should be a period after the word "license". The word "and" should be stricken out and the next word "therefore" should have a capital "T". The sentence was mispunctuated.

Page 7853, line 18. The words "it commands us" should be stricken out and the words "we are commanded" should be written in. In line 19, the word "its" should be stricken out and the words "the Court's", there in the possessive singular, should be written in front of the word "decisions."

Page 7854, line 2. The first word should be the word "that" and not the word "as". Line 3. The word "and" [fol. 242] after the word "heard" should be the word "to". There should be a comma after the word "heard" preceding that, and the last word in the line, the word "of" should be stricken out.

Page 7859, line 6. The word "statements" should be "restatements". Mr. Steffen had said just prior to that "Those are restatements of fact". I repeated his phrase "restatements".

Page 7879, line 4. Put a period after the word "evidence". Line 5. The first word should be capitalized, the word "but". Line 6. The word "issued" should be "issues". Line 8. The words "or not to" should be stricken out and in their place should be written in the words "determination of". That is an editing change to make the sentence more clear, making it read "which inferences lead to determination of the ultimate facts in issue in the case". Line 9. The word "and" should be stricken out and the word "that" put in, in its place. After the word "was" the word "thus" should be written in, making it read "where there is a dispute as to the inferences to be

drawn from admitted facts, which inferences lead to determination of the ultimate facts in issue in the case—that there was thus an orthodox conflict", et cetera.

Page 7887. The word "not" should be put in after the word "would" in line 2. Judge Jackson said "But they had their own machinery. They would not have had to [fol. 243] retool to do it."

Page 7890. That is a small matter of punctuation. After the word "things" in line 23 take out the comma.

Page 7893, line 21. After the word "Bromley" put a period and put a capital letter on the word "the" which immediately follows. After the word "far" in line 22, put in the word "is", so that the sentence reads "The greatest defect I see in your argument so far, is that it seems entirely reasonable."

Page 7903, line 19. I may have misspoken. I should have said General Electric case and not Gypsum case. Strike out "Gypsum" and write in the words "General Electric".

Page 7922, line 17. After the word "the" and before the word "supplement" write in the word "Federal" and capitalize the word "supplement". Line 22. Strike out the words "giving the" and write in the word "citing".

Page 7911, line 16. The word "Has" should be "Have". The word "court" should be in the plural, making the sentence read "Have the courts ruled", et cetera, referring to the courts' rulings generally.

Page 7913. The word "the" in the first line should be the word "a." That is the first word "the." The second word "the" should also be the word "a". In line 2, the second word "the" before the word "answer" should be the word "his", making the sentence read "On a motion [fol. 244] for summary judgment, if a defendant can make out that the issues raised by his answer are genuine", et cetera.

Page 7923, line 5. The word "The" should be the word "Then". It should read "Then citations are given." Line 13. Strike out the words "in the sense of" and strike out the letters "ing" after the word "condemn", and write in the word "to" so that it reads "But unless you are aiming at proving an effectuated conspiracy, to condemn the overt

acts", et cetera. Line 16, the word "proof" after the word "circumstantial" should be stricken out.

Page 7928, line 18. It should read "the monopoly" rather than "that monopoly".

Page 7930, line 1. The word "In" should be inserted before the word "The" and the word "The" should have a small letter, making it read "In the one which I first read, it seems arguable that the Supreme Court was holding that a plurality of licenses", et cetera. In line 2 the word "the" before the word "plurality" should be changed to the word "a". In line 3, the word "was" should be changed to the word "is". Also in line 3, the word "said" next to the last word in the line should be the word "says".

Page 7931, line 12. The word "was" should be the word "is".

Page 7932. Line 21. After the words "question of the" insert the words "legality of", and in place of the word [fol. 245] "the" insert the word "a", making it read "Perhaps, therefore, the Supreme Court was not intending there to rule definitely upon a question of the legality of plurality of licenses."

There is a statement at the bottom of page 7931 reading:

> "Now, I confess that I have always thought that it was clear law that in order to make declarations admissible, you didn't have to prove an unlawful conspiracy by evidence aliunde", et cetera.

I am not quite sure that is what Mr. Bromley said, but I don't assume to change the comments of counsel.

Page 7935, line 5. Judge Garrett used the word "proffers" in the plural. There were several proffers. The same thing is true in line 9, the word "proffer" should be changed to the word "proffers". Line 17, the word "question" should be changed to the word "questions", in the plural.

Page 7936, line 11. Strike out the word "and" after the word "issues" and put in a dash. In line 12, put a dash after the word "fact". After the word "case" in line 13, put another dash and start the next phrase with a small letter, reading "the issues". In line 14, change the word "of" to the word "from".

Mr. Knuff: First "of" or second "of"?

Chief Justice Stephens: Second "of". So it reads "and from the defendant's answers", et cetera.

In line 18, Mr. Court Reporter, that word "Topic 5" [fol. 246] should be printed in a Roman numeral rather than Arabic. The Supreme Court numbered its topics in Romans.

Page 7937, line 7. It should read "a plurality of licenses" rather than "the plurality of licenses", changing "the" to "a". Line 16, change the word "the" toward the end of the line to the word "this", and print the "Court" without a capital, referring to the District Court and not the Supreme Court. Line 23. The word "would" instead of the word "could".

Page 7938, line 4. The word "its" should be changed to the word "their". Line 5. The word "its" should be changed to the word "their", and the word "answer" should be in the plural, "answers". Line 18. Again the phrase "the Court" should be changed to "this court", with a small "c" on the word "Court".

Page 7939, line 18. The word "might" should be changed to the word "may". Line 16. The word "that" before the word "while" should be stricken out.

Page 7941, line 4. The word "Court" should not be capitalized. Line 9. The word "Court" should not be capitalized. Line 15. The comma should come out after the word "defendants". I made these corrections before.

There is one other place where you used the word "plaintiffs", Mr. Court Reporter, in place of the word "defendants". It is in one of your headings where you referred [fols. 247-248] to the plaintiffs and meant defendants. If you look through your headings, you will find one place where you had Mr. Bromley representing the plaintiff or Mr. Steffen or Mr. Knuff representing the defendants, I have forgotten which.

Page 7923. I think the sense of the correction which I made in line 13 would be improved if I put a comma after the word "conspiracy".

If there is nothing further, the court will be in recess until the expiration of the 120 days from June 29, at which time the Government will present a proposed decree.

(Whereupon, at 11:55 a.m., a recess was taken until 120 days from June 29, 1948.)

[fol. 249] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; Certain-Teed Products Corporation; The Celotex Corporation; Ebsary Gypsum Company, Inc.; Newark Plaster Company; Samuel M. Gloyd, Doing Business Under the Name of Texas Cement Plaster Company; Sewell L. Avery; Oliver M. Knode; Melvin H. Baker; Henry J. Hartley; and Frederick Tomkins, Defendants

PLAINTIFF'S PROPOSED DECREE—Filed April 19, 1950

This cause having duly come on to be heard on motion of plaintiff for a summary judgment, filed at the request of the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, as amended, or in the alternative, for such further proceedings as the Court should order, based upon the existing state of the record; and the Court having considered the pleadings in the action and all proceedings heretofore had herein, including all exhibits and testimony of witnesses, the admissions by counsel for the defendants, the proffer of proof submitted pursuant to the Court's request of June 8, 1948, by all defendants, except National [fol. 250] and Ebsary which defendants did not submit any proffer of proof; having read and considered the briefs submitted on behalf of the parties hereto; having heard oral argument; having found that there is no genuine issue as to any material fact except as to the proper inferences to be drawn from the exhibits and uncontradicted testimony of witnesses who testified at the trial of this cause, and also except as to the scope and extent of the relief to be granted; and the Court having made findings of fact and conclusions of law wherein the defendants have been found to have violated Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C.A. Sec. 1 and 2;

Now, therefore, upon motion of plaintiff by its attorneys for relief in accordance with the prayer of the complaint, and the defendants having severally appeared by counsel,

It is Ordered, Adjudged and Decreed:

I

That the Court has jurisdiction of the subject matter herein and of all the parties hereto; that the complaint states a cause of action against defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Anti-trust Act and the acts amendatory thereof and supplemental thereto.

II

That for the purpose of this decree:

1. "Said defendants" shall mean all the corporate defendants and the individuals named in the caption of this decree.

[fol. 251] 2. "Corporate defendants" shall mean all the defendants mentioned in the caption of this decree except the named individuals and Texas Cement Plaster Company.

3. "Gypsum products" shall mean those products used primarily in the building construction industry made from gypsum, including but not limited to, plaster, plasterboard, lath, wallboard (the latter three may be ordinary, perforated, or metallized), special surfaced gypsum board, sheathing, liner board, block, tile, and Keene's cement.

4. "Gypsum board" shall mean all the gypsum products enumerated in subparagraph 3 except plaster, block, tile, and Keene's cement.

5. "Patents" and "patent applications" shall mean United States Letters Patent and applications for United States Letters Patent, respectively, and continuations, continuations-in-part, renewals, reissues, divisions, and extensions thereof.

III

That said defendants, and each of them, have contracted, combined, and conspired to restrain trade and commerce

in gypsum products and have monopolized, attempted to monopolize, combined and conspired to monopolize trade and commerce in gypsum board among the several States, in violation of Sections 1 and 2 of the Sherman Antitrust Act.

[fol. 252]

IV

That the provisions of this decree applicable to any defendant shall apply to such defendant and to each of its officers, directors, agents, attorneys, servants and employees, and to each of its successors and assigns, and to all persons acting or claiming to act, under, through or for such defendant.

V

That the said defendants, in connection with the offering for sale, sale, and distribution of gypsum products in interstate commerce, be and each of them hereby is jointly and severally enjoined and restrained from entering into, continuing, cooperating in, or carrying out any planned common course of action, undertaking, agreement, combination, or conspiracy between any two or more of said defendants, or between any one or more of said defendants and others not parties hereto, to do or perform any of the following things:

1. To fix, establish, maintain, control, or make uniform the prices, terms and conditions of sale at which gypsum products shall be sold or resold;

2. To fix, establish, maintain, or make uniform the kinds, types, or varieties of gypsum products manufactured or sold; or the methods of manufacturing, selling, packaging, shipping, delivering, or distributing gypsum products, for the purpose or with the effect of aiding or assisting in arriving at or maintaining uniform prices, terms and conditions of sale of such products;

3. To refrain from the manufacture, sale, or distri- [fol. 253] bution of any kind, type, or variety of gypsum products; or the method of manufacturing, selling, packaging, shipping, delivering, or distributing gypsum products, for the purpose or with the effect of

aiding or assisting in arriving at or maintaining uniform prices, terms and conditions of sale of such products;

4. To refrain from selling to or distributing gypsum products to any purchaser or any class of purchasers of such products;

5. To use, determine, agree upon, or adhere to any system of quoting or selling gypsum products at prices calculated or determined pursuant to or in accordance with the basing-point delivered-price system; or quoting or selling gypsum products pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for gypsum products at points of quotation or sale or to particular purchasers by defendants using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more of the defendants against any other defendant;

6. To use, compile, circulate, or exchange information concerning common carrier transportation charges or other freight or delivery charges used or to be used as a factor in computing the price of gypsum products;

7. To use, determine, agree upon, or adhere to any basis for the selection or classification of purchasers of gypsum products;

8. To use, determine, agree upon, or adhere to any methods, means, conditions, practices, or delivery [fol. 254] points or areas used or to be used in selling, shipping or distributing gypsum products;

9. To directly or indirectly police, investigate, check, or inquire into the prices, quantities, terms and conditions of any offer to sell, sale or resale of gypsum products for the purpose or with the effect of aiding or assisting in maintaining uniform prices, terms and conditions of sale of such products;

10. To hold meetings, gatherings, or conferences for the purpose or with the effect of aiding or assisting in maintaining uniform prices, terms and conditions of sale of gypsum products.

VI

1. That defendant United States Gypsum Company is hereby ordered and directed to grant to each applicant therefor, but only insofar as it has the right to do so, a non-exclusive license to make, use and vend under any, some, or all patents and patent applications now or hereafter owned or controlled by it relating to gypsum products, their processes or methods of manufacture, or their uses.

2. That defendant United States Gypsum Company is hereby enjoined and restrained from making any sale or other disposition of any of said patents or patent applications which deprives it of the power or authority to grant such licenses, unless it sells, transfers or assigns such patents and patent applications and requires, as a condition of such sale, transfer or assignment, that the purchaser, transferee or assignee shall observe the requirements of Sections VI and XI of this decree and the purchaser, transferee or assignee shall file with this Court, [fol. 255] with notice thereof to the Attorney General, prior to consummation of said transaction, an undertaking to be bound by the provisions of Sections VI and XI of this decree.

3. That defendant United States Gypsum Company is hereby enjoined and restrained from including any restriction or condition whatsoever in any license or sublicense granted by it pursuant to the provisions of this section except that: (a) the license may be non-transferable; (b) a reasonable non-discriminatory royalty may be charged, provided, however, that the royalty so charged may not be imposed upon or measured by patent-free products, processes or uses; (c) reasonable provision may be made for the cancellation of the license upon failure of the licensee to pay the royalties as hereinabove provided; (d) the license must provide that the licensee may cancel the license at any time by giving 30 days' notice in writing to the licensor; and (e) the license must provide that the licensee shall immediately have the benefit of any more favorable terms granted other licensees. Without limiting the generality of anything hereinbefore provided, the license may not contain any provision authorizing,

allowing, or permitting defendant United States Gypsum Company to inspect the books and records of any licensee.

4. That upon receipt of written request for a license under the provisions of this section, defendant United States Gypsum Company shall advise the applicant of the royalty which it deems reasonable for the patents or patent applications to which the request pertains. If the parties are unable to agree upon a reasonable royalty within 60 days from the date such request for the license was received by United States Gypsum Company, the applicant therefor [fol. 256] may forthwith apply to this Court for the determination of a reasonable royalty, and United States Gypsum Company shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General with the right to be heard thereon. In such proceeding, the burden of proof shall be on United States Gypsum Company to establish the reasonableness of the royalty requested by it, and the reasonable royalty rates, if any, determined by the Court shall apply to the applicant and all other licensees under the same or substantially the same patents or patent applications. Pending the completion of negotiations between the parties or any proceeding before this Court, the applicant shall have the right to make, use and vend under the patents or patent applications to which his application pertains without payment of royalty or other compensation, but subject to the provisions of subsection 5 of this section.

5. That where the applicant has the right to make, use and vend under patents or patent applications under subsection 4 of this section. United States Gypsum Company may apply to the Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty, if any. If the Court fixes such interim royalty rate, United States Gypsum Company shall then issue and the applicant shall accept a license, or as the case may be, a sublicense, providing for the periodic payment of royalties at such interim rate from the date of the filing of such application by the applicant. If the applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such action shall be grounds for the dismissal of his application. Where

an interim license or sublicense has been issued pursuant to this subsection, reasonable royalty rates, if any, as finally determined by the Court shall be retroactive for the applicant and all other licensees paying a higher royalty rate [fol. 257] under the same or substantially the same patents or patent applications to the date the applicant files his application with the Court.

6. Nothing herein shall prevent the plaintiff or any applicant from attacking, in the aforesaid proceedings or in any other proceedings, the validity or scope of any patents or patent applications nor shall this decree be construed as importing any validity or value to any of said patents or patent applications.

VII

1. That each and all of the patent license agreements, contracts, assignments, and other arrangements relating to board, metallized board, and perforated lath which have been heretofore entered into between United States Gypsum Company and each of the other corporate defendants or their predecessors and with defendant Samuel M. Gloyd, are hereby cancelled; such cancellation to be effective upon the execution by United States Gypsum Company and each of the other defendants of a uniform license agreement pursuant to Section VI hereof, or upon the expiration of sixty days from the date of the entry of this decree, whichever is earlier.

2. That from and after the effective date of the cancellation provided for in subsection 1 of this section, each defendant is hereby enjoined and restrained from the further performance of any such agreement, contract, assignment or other arrangements, and from adopting, adhering to or entering into any future substantially similar agreement, contract, assignment or other arrangements.

VIII

That each of said corporate defendants and defendant Samuel M. Gloyd is hereby enjoined and restrained, [fol. 258] directly or indirectly, from conditioning the sale of any kind, type or variety of gypsum products to any purchaser thereof upon the procurement by said purchaser

of any other kind, type or variety of gypsum or other products whatsoever from any of said defendants or from any other designated source.

IX

That each of said corporate defendants and defendant Samuel M. Gloyd is hereby directed to sell gypsum board which is then being or about to be offered or shall have been offered by any such defendant in the United States, to any other manufacturer of gypsum products at non-discriminatory prices, terms and conditions; provided that:

1. Gypsum board is available for such purposes;
2. Any such defendant shall not be required to sell unless it is offering, about to offer, or has offered the type, kind or variety of gypsum board within the United States and at any time any defendant may discontinue the business of selling gypsum board;
3. Such sale is not required to be made without cash payment or security to any manufacturer of gypsum products not having proper credit rating; and
4. The sale price may differ from time to time as to different types or kinds of gypsum board so long as the sale price at any one time is uniform to all buyers alike as to each type or kind of gypsum board.

X

1. That each of said corporate defendants and defendant [fol. 259] Samuel M. Gloyd, while engaged in the manufacture and sale of gypsum products, is hereby enjoined and restrained from acquiring, purchasing, acquiring and holding or acquiring and controlling, directly or indirectly, or through agents, representatives, or nominees, the business or assets or capital stock or bonds of any other defendant herein.

2. That each of said corporate defendants and defendant Samuel M. Gloyd, while engaged in the manufacture and sale of gypsum products, is hereby enjoined and restrained from acquiring, purchasing, acquiring and holding or acquiring and controlling, directly or indirectly, or through agents, representatives or nominees, the business or assets

or any measure of control over the business of any competing corporation, firm, or individual so engaged, unless and until any such acquisition is approved by this Court, after reasonable notice to the Attorney General with an opportunity to be heard thereon; provided, however, that this subsection of this section shall not prevent any of the corporate defendants or defendant Samuel M. Gloyd from acquiring, purchasing, acquiring and holding or acquiring and controlling the business or asssets or capital stock or bonds of any corporation, firm, or individual engaged in business solely outside the territorial limits of the United States and its possessions.

3. That the defendants Sewell L. Avery, Oliver M. Knode, Melvin H. Baker, Henry J. Hartley, Frederick G. Ebsary, and Frederick Tomkins and each of them, while officers or directors of any of the corporate defendants engaged in the manufacture or sale of gypsum products, is hereby enjoined and restrained from acquiring, purchasing, acquiring and holding or acquiring and controlling, directly or [fol. 260] indirectly, or through agents, representatives, or nominees, any measure of control through ownership of stock or bonds or otherwise of any corporation, firm, or individual so engaged competing with the corporation with which he is officially connected unless any such acquisition is approved by the Court, after reasonable notice to the Attorney General with an opportunity to be heard thereon; provided, however, that this subsection of this section shall not prevent any of the above-named individuals from acquiring, purchasing, acquiring and holding or acquiring and controlling the business or assets or capital stock or bonds of any corporation, firm, or individual engaged in business solely outside the territorial limits of the United States and its possessions.

XI

That the attorney General of the United States or his proper representative shall, for the purpose of securing compliance with this decree, be permitted (1) access, during the office hours of the said defendants, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under control of said defendants, relating to any matters contained in this decree,

(2) subject to any legally recognized privilege, without restraint or interference from the defendants, to interview officers or employees of the defendants, who may have counsel present, regarding any such matters; provided, however, that information obtained by the means permitted in this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings, for the purpose of secur- [fols. 261-264] ing compliance with this decree in which the United States is a party or as otherwise required by law.

XII

That judgment is entered against the said defendants for all costs to be taxed in this proceeding.

XIII

Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this decree, or any other person, firm or corporation that may hereafter become bound, in whole or in part, thereby to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of this decree, and (2) for the enforcement of compliance therewith and the punishment of violations thereof.

—— ——.

[fol. 265] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S PROPOSED DECREE, FINDINGS AND CONCLUSIONS—Filed March 4, 1949

This memorandum is submitted by the defendants in opposition to the proposed decree, findings of fact and conclusions of law submitted by plaintiff upon the motion for summary judgment herein. Defendants object generally to such proposed decree, findings and conclusions upon the

ground that they go far beyond the scope of the issues determined by this Court upon plaintiff's motion for summary judgment. In addition, such proposed decree, findings and conclusions are specifically objectionable upon grounds hereinafter stated.

I

In Granting Plaintiff's Motion for Summary Judgment, this Court Decided the Issue Presented by the Motion and Did Not Purport to Determine in Plaintiff's Favor All Issues Presented by the Pleadings.

Plaintiff's proposed findings, conclusions and decree purport to cover the charges made in the complaint, including the allegations under the general headings of The Formation of the Combination, The Operation of the Combination, and The Effect of the Combination. It therefore becomes necessary at the outset to consider the nature of the conspiracy specifically charged in the complaint and the nature of the conspiracy which plaintiff, on its motion for summary judgment, contended was conclusively established on the present record.

The complaint charges that the defendants are parties to contracts and actively engaged in a continuing combination and conspiracy to restrain trade and commerce in gypsum board, plaster and miscellaneous gypsum products and to [fol. 266] monopolize such trade and commerce, among the several states in the eastern area of the United States in violation of Sections 1 and 2 of the Sherman Antitrust Act (Compl., Pars. 44, 45), by concertedly (a) raising and fixing at arbitrary and non-competitive levels the prices of gypsum board, (b) standardizing gypsum board and its method of production, (c) raising, maintaining and stabilizing the general level of prices for plaster and miscellaneous gypsum products, (d) refraining from distributing gypsum board, plaster, and miscellaneous gypsum products through jobbers, and (e) inducing and coercing manufacturing distributors to resell gypsum board at prices fixed by defendants; that the combination was entered into and carried out in part under the guise of numerous license agreements under patents owned by the defendant USG; and that to give color of legality to the combination the defendants

concertedly agreed among themselves to enter into and did enter into said license agreements which were not *bona fide* but entered into for the illegal purposes described in paragraphs 44 and 45 (Compl., Par. 46).

With respect to The Formation of the Combination, the complaint alleges that the combination was formed between September, 1925 and early 1930, having its roots in litigation which made the manufacture of closed-edge board impossible without infringement of USG's patents (Compl. Pars. 47-54; R. 11-13); that Avery of USG, Blagden of Beaver, and Griswold of American agreed among themselves (between September 1925 and July 1926) to induce the industry to enter into licenses with USG to effectuate long-term price stabilization of the gypsum board industry, Blagden and Griswold to act as liaison between USG and the industry for that purpose (Compl. Pars. 55-63; R. 13-15); that between July and September, 1926 Beaver and Universal accepted USG's proposed license with price control, and Griswold and Blagden continued to agitate at meetings and conferences for the execution of licenses by the rest of the industry, as a result of which and the persuasions of Blagden, Griswold and Avery, Atlantic and Texas entered into licenses in March and April, 1927 (Compl. Pars. 64-66; (R. 15-16); and that from April, 1927, to May 1929, during a price war in the industry, Holland of Universal agreed with Avery to promote the licensing plan at meetings held in late 1928 and early 1929, and Avery, to induce other companies to join, assured them that USG, upon expiration of the Utzman patent in August, 1929, would take steps to control prices thereafter under color of some patent (Compl. Pars. 67-75; R. 16-18).

The complaint in this connection further alleges that in May, 1929, National, Certain-teed, Ebsary and Niagara entered into licenses in reliance upon Avery's assurance of further price control and pursuant to an agreement among themselves and USG to do so; that in addition USG and its licensees agreed that the manufacture of open-edge and [fol. 267] second-grade closed-edge board would be discontinued, that USG would advance and stabilize prices for patented board, that all companies would increase their prices for plaster and miscellaneous gypsum products as

board prices increased, and that USG would continue price control after expiration of the Utzman patent through use of other patents (Compl. Pars. 76-77; R. 18-19); that from June to October, 1929, pursuant to its agreement for continued price control and to give color of legality thereto, USG offered licenses to its licensees under its foam or bubble patent applications; that pursuant to agreements between USG and its licensees to grant and take licenses thereunder, USG acquired the Haggerty and Hite starch patents from Universal and executed licenses covering the foam process and the starch patents (Compl. Pars. 78-84; R. 19-20); that the October and November 1929 license agreements were entered into between USG and its licensees, and American and Kelley, under the bubble invention and starch patents, pursuant to said agreements and for the purpose of continuing price control; and that by virtue of those agreements USG, by 1930, was authorized to control all board prices and all companies except Texas (until 1937 when it also took a license) were obliged to manufacture a uniform, standardized board (Compl. Pars. 85-88; R. 20-22).

With respect to The Operation of the Combination, and The Effect of the Combination, the complaint alleges in considerable detail that pursuant to the agreements as aforesaid prices of board were raised, stabilized and maintained at high, arbitrary and noncompetitive levels; that USG and its licensees concertedly standardized production of board; that after meetings and discussions they concertedly eliminated jobbers through the elimination of the jobbers' discount; that they concertedly controlled prices and methods of distributing unpatented gypsum board, plaster and miscellaneous gypsum products; that they concertedly controlled the prices at which manufacturing distributors resold board; that for the purpose of extending and strengthening the operation of the basic license agreements, the metallized board and the perforated lath licenses were entered into; and that by means of the combination the defendants have controlled and dominated the manufacture and distribution of gypsum board, plaster and miscellaneous gypsum products in the Eastern Area, have eliminated certain factors from the distribution system, and have maintained uniform and non-competitive prices

in board, plaster and miscellaneous gypsum products higher than those prevailing when the combination was formed in 1929 (Compl. Pars. 90-123; R. 23-32).

This Court, in an exhaustive review of the law and the facts, concluded at the close of the Government's case that the conspiracy as charged in the complaint had not been proved and that the patent license contracts and price bulletins were legal within the doctrine of the *General Electric* case, 272 U. S. 476 (D. C. Op., R. 3934-4131). Accord-
[fol. 268] ingly, at the close of the Government's case it ordered the complaint dismissed.

Following the reversal of that judgment by the Supreme Court, plaintiff moved for summary judgment in its favor on the ground that adherence by the defendants, in an entire industry, to the price provisions of patent licenses, with knowledge of the adherence thereto by the others, constituted concert of action in violation of the Sherman Act.

Thus plaintiff contended that under the Supreme Court's opinion, the *General Electric* case did not authorize a patentee to issue to all competitors in an entire industry a plurality of licenses containing price-fixing clauses and that such plurality of licenses and adherence to the price provisions thereof constituted concert of action in restraint of trade despite the assumed legality of each separate patent license, under the doctrine that lawful acts may become unlawful when taken in concert (Pltf.'s Sum. J. Br., 24-5).

Such concert of action being the gist of the offense, counsel urged that plaintiff had only to establish its existence, without any issue as to a material fact, and that all of the other abuses normally constituting a violation of the Sherman Act could be laid aside. In answer to the Court's question, counsel said that for purposes of the motion it was not essential to show those violations; that if price control alone were shown there was a case; and that it was the Governments' intention to ask for summary judgment on that basis (Tr. 7814-15).

In this connection counsel stated the essential elements he had to establish, namely, whether the defendants, erstwhile competitors, had combined to fix prices, and whether that is so clear that there was no genuine issue as to any material fact. He pointed out that there was no question that they

were former competitors; that they all took out licenses which contained a price-fixing agreement; and that all that remained was to show concert of action by showing that at some time they learned there were other competitors in the industry all guiding themselves by USG bulletins (Tr. 7822, 7824-5). None of the licensee defendants ever denied that it took a patent license contract and adhered to the minimum price bulletins issued by USG, the licensor defendant.

Finally, to establish its position, plaintiff asserted it had shown: (1) that the patent license contracts admittedly were executed by the several defendants and the price bulletins issued thereunder were adhered to by them (Tr. 7824-5), (2) that at the meeting of May 23, 1929, USG offered a license under the foam application to any of the licensees who desired it, which licenses were subsequently accepted by the licensees and signed in November 1929 (Tr. 7823), (3) that defendants admitted the formation by USG in 1932 of Board Survey and the subsequent policing by it of the board prices (Tr. 7831-32), (4) that it was admitted that at the meeting of October 17, 1932, the defendants learned they were all operating under similar licenses [fol. 269] and price bulletins (R. 7832), (5) that it was admitted that all of the licenses provided for price control (Tr. 7834-5), and (6) that counsel for the defendants admitted before the Supreme Court that because of the most-favored nation clause in the patent licenses each of the licensees must have known that it was participating in a general plan (Tr. 7836-7).

Counsel argued from this that there was a clear-cut case of the defendants, erstwhile competitors, going into a plan to license the entire industry and fix prices, each eventually knowing that the others were in the plan; that there was a combination or conspiracy under Section 1 of the Sherman Act without the necessity of showing any intent; and that the Supreme Court of the United States had so held (Tr. 7835-7).

Upon the same showing, plaintiff contended that there was no genuine issue as to any material fact concerning the existence of a monopoly under Section 2 of the Sherman Act (Tr. 7848-51, 7854).

In the light of the allegations of the complaint and the

proceedings heretofore had in this case, the charges of conspiracy here involved may be classified as follows:

(1) The charge that defendants, competitors in an entire industry, by severally entering into individually lawful patent license agreements with price limitation provisions adhered to by them with knowledge of the adherence of the others, acted in concert to restrain trade in gypsum board (sometimes, for convenience, referred to herein as "combination by plurality of licenses"); and

(2) The charge that defendants entered into a plan or scheme to fix prices and control the production and distribution of gypsum board and other gypsum products, in part by the execution of patent licenses, adopted to disguise defendants' illegal purposes and in part by agreements relating to unpatented products (as more fully set forth in the complaint), and have thereby conspired to restrain trade in gypsum board (sometimes for convenience, referred to herein as "conspiracy extrinsic to the plurality of licenses").

The Court, upon its construction of the Supreme Court's opinion and the showing made by plaintiff of the admissions with respect to the execution of the patent license contracts with price limitation adhered to by the licensees, as above stated, concluded that the defendants had acted in concert to restrain trade and commerce in patented gypsum board among the several states in the eastern territory of the United States in violation of the Sherman Anti-Trust Act. Thus, the Court determined the motion for summary judgment upon the ground that the defendants had become parties to a "combination by plurality of licenses." It did not decide that defendants had become parties to a "conspiracy extrinsic to the plurality of licenses".

[fol. 270] II

Plaintiff's Proposed Decree, Findings and Conclusions Are Improper In Their Entirety

The principles of law applicable to framing an equity decree are clear. Because the purpose of a decree is remedial, not punitive, a court must take care that a "decree be

no more drastic than the facts of the case and the law demand", *United States* v. *E. I. du Pont de Nemours & Co.*, 188 Fed. 127, 153 (C. C. Del., 1911), and bear a "fair relation to the issue which was heard and determined," *N. L. R. B.* v. *Swift & Co.*, 108 F. (2d) 988, 990 (C. C. A. 7th, 1940). This is not to say that a decree can deal only with the exact violations found to have been committed, but a court "cannot issue a general injunction against all possible breaches of the law," *Swift & Co.* v. *United States*, 196 U. S. 375, 396 (1905). A court is bound to frame its decree so as to suppress only "the unlawful practices and to take such reasonable measures as would preclude their revival," *Ethyl Gasoline Corporation* v. *United States*, 309 U. S. 436, 461 (1940).

The necessity and propriety of any particular provision can be determined only by examining the precise nature and extent of the violation of law found to exist, its consequences, and the purposes and intent of the violators. An injunction appropriate in such flagrant cases of continuing, broad and purposeful conspiracies as those found to have existed in other cases such as *United States* v. *Hartford-Empire*, 323 U. S. 386 (1945), would obviously be inappropriate and punitive in this case.

(a) The Proposed Decree

Upon the plaintiff's theory of the case it is entitled to a decree within the scope of the determination made on the motion for summary judgment, *i.e.*, that the defendants, competitors in an entire industry, had acted in concert to restrain trade and commerce under the patent license contracts with price limitation adhered to by them with knowledge of the adherence of the others. It does not follow, upon the present state of the record, that because the Court held that the price provisions of the patent license contracts were illegal, all the charges outside the scope of that determination were established, as plaintiff now seems to assume or take for granted. Alleged agreements in restraint of trade and commerce in gypsum products outside the scope of the determination, including, for example, those with respect to raising and maintaining the prices of plaster and miscellaneous gypsum products, eliminating jobbers of such products and fixing the resale prices of manufacturing dis-

tributors, were in controversy between the parties, as shown by the pleadings and offers of proof.

[fol. 271] The Court, in deciding the motion for summary judgment, in face of the denials in the answers, the failure of proof by plaintiff, the offers of proof to the contrary, and finally the findings of fact by the court upon the same record that the plaintiff had failed to prove the charges, did not hold that all those charges were established by plaintiff upon the present state of the record. The judgment upon the motion included those charges within the scope of the determination, which involved the price control of patented gypsum board manufactured and sold under the patent license contracts and the price bulletins. In fact, the Court, in disposing of the case upon the motion for summary judgment, necessarily must have concluded that those other charges were not established by the plaintiff, otherwise it would not have denied defendants the right to interpose their defense thereto. Furthermore, the Court, as shown, originally found that those charges had not been proved and it should not now upon the same record be asked to find that they were (Orig. FF. 57, 73, 80-84, 86, 94-97, 103-117, R. 4155, 4158-4160, 4162-4167; D. C. Op., R. 4065-72, 4079-4100).

Plaintiff's proposed decree not only provides for relief with respect to violations charged in the complaint outside the scope of the determination upon the motion, but violations not even charged in the complaint. It contains a blanket holding of a violation of Sections 1 and 2 of the Sherman Antitrust Act and an injunction with respect to the manufacture, sale and distribution of every product in the gypsum industry, covering numerous items, among them prices, selling, packaging, shipping, delivery and distribution, classification of purchasers, exchange of information and meetings, applying to all gypsum products, alleged violations charged in the complaint which were not proved, and alleged violations not even charged in the complaint. It also contains many punitive provisions not at all warranted by the circumstances of the case or within the intent of the Court in directing plaintiff to submit a final decree on the motion for summary judgment.

A final decree, as stated above, which grants relief within

the scope of the determination upon the motion as determined by the Court will afford plaintiff ample protection. A decree finding that the defendants, by adhering to the price limitation provisions of the patent license contracts, with knowledge of the adherence of the others, acted in concert to restrain trade and commerce and in violation of the Sherman Antitrust Act, and adjudging the price provisions of the patent license contracts unlawful, and directing the cancellation of the licenses, with an adequate injunction against future violations, is sufficient.

Without waiving our objection to the entry of any decree in favor of plaintiff, we attach hereto, as Exhibit A, a form of decree which, in our view, affords all the relief to which plaintiff may reasonably be held to be entitled under the [fols. 272-277] decision of this Court upon the motion for summary judgment.

(b) The Proposed Findings and Conclusions

Plaintiff's motion for summary judgment in its favor was filed pursuant to Rule 56 of the Federal Rules of Civil Procedure. Even prior to the 1948 amendment of the Federal Rules of Civil Procedure, it had been uniformly held by the courts that findings of fact and conclusions of law were unnecessary on the decision of motions under Rule 56. *Lindsey* v. *Leavy*, 149 F. (2d) 899, 902 (C. C. A. 9th, 1945); *Burman* v. *Lenkin Construction Co.*, 149 F. (2d) 827, 828 (App. D. C., 1945); *Huffman* v. *Norfolk & Western Ry.*, 71 F. Supp. 564, 565 (W. D. Va., 1947). And the 1948 amendments to the Rules added the following specific provision to Rule 52(a);

> "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)".

Rule 41(b) has, of course, no application here. Accordingly, we submit that there is no occasion for the court to make any findings of fact and conclusions of law in this case.

If the Court concludes, nevertheless, to make findings of fact, then we submit that findings naming the defendants, defining the nature of the business in interstate commerce in the eastern area, describing the process of manufacture

of gypsum board, the history of the development of the patents and the licensing thereunder, the acceptance of the licenses by the defendants and the issuance of price bulletins thereunder by licensor and the adherence thereto by the defendant licensees with knowledge of the adherence of the others, the organization of Board Survey, Inc. and its activities in investigating performance under the licenses, together with the admissions relied upon by the plaintiff upon its motion for summary judgment to show knowledge among the defendants and concert of action, are ample to support any decree which may properly be entered herein. These constitute the very findings of fact which the Court made with respect to the main issue in the case when it dismissed the complaint (FF 1-21, 31, 60; R. 4132-44, 4148; 4155). For the convenience of the Court, in the event that it should conclude to make separate findings of fact and conclusions of law, we annex hereto, as Exhibit B, all the findings and conclusions which we believe to be proper in the light of the determination made by this Court upon the motion for summary judgment.

[fol. 278] III

The Specific Provisions of Plaintiff's Proposed Decree Are Punitive and Inappropriate

For the convenience of the Court, we shall here discuss, in order, each of the Sections of the plaintiff's proposed decree to which specific objection is made:

Sec. II

Section II of plaintiff's proposed decree, consisting of sub-paragraphs 1 to 5 covers definitions designed to carry out many of the objectionable provisions to which we take exception and should be read along with the objections pointed out below with respect to each separate section of the decree.

The term "gypsum products" is defined as meaning "those products used primarily in the building construction industry made from gypsum, including but not limited to" numerous specified products. Thus the plaintiff seeks to include products not included in the complaint, which was limited to gypsum board and plaster and miscellaneous

gypsum products, the latter being defined in the plaintiff's Bill of Particulars as "gypsum block, gypsum tile, and Keene's cement" (R. 158).

"Patents" and "patent applications" are defined so as to include any letters patent heretofore or hereafter issued and any applications or letters patent heretofore or hereafter made. As so defined, plaintiff's proposed decree would have the effect of providing for forfeiture of rights in all of defendant United States Gypsum Company's patents and patent applications—past, present and future.

Sec. III

Section III of plaintiff's proposed decree provides that defendants have contracted, combined and conspired to restrain trade and commerce in gypsum products and have monopolized, attempted to monopolize, combined and conspired to monopolize trade and commerce in gypsum board among the several states, in violation of Sections 1 and 2 of the Sherman Act.

As to Section 1 of the Sherman Act, this provision not only includes trade and commerce in all gypsum products among the several states but fails to set forth in what re- [fol. 279] spects defendants restrained trade and commerce within the meaning of Section 1 of the Act. The scope of the final determination upon the motion for summary judgment covered only concert of action to restrain trade and commerce in patented gypsum board in the eastern territory of the United States under the plurality of patent license contracts described in the complaint. In lieu of Section III as suggested by plaintiff, it should be provided that the defendants, by adhering to the minimum price provisions of the patent license contracts, with knowledge of the adherence of the others, acted in concert to restrain trade and commerce in the manufacture and sale of patented gypsum board among the several states in the eastern territory thereof, in violation of Section 1 of the Sherman Act.

As to Section 2 of the Sherman Act, this provision includes trade and commerce in all gypsum board among the several states and fails to set forth in what respect the defendants monopolized or attempted to monopolize within the meaning of Section 2 of the Act. Only the sale of patented

board in the eastern territory of the United States was involved, and the provision should be so limited. Although defendant USG had a monopoly under the patent laws, there was not, as we have heretofore shown, any monopoly or intent to monopolize within the meaning of Section 2 of the Sherman Act.

Sec. IV

Section IV of plaintiff's proposed decree provides that the provisions applicable to any defendant shall apply to such defendant and to each of its officers, directors, agents, etc. According to the definitions in Section II of the decree, the word "defendants" means all the corporate defendants and the individuals. We think the decree should apply to the defendant companies and their officers, directors, agents, servants and employees, but not to the individual defendants as such.

Upon the motion for summary judgment, concert of action was shown only with respect to the defendant companies and not the individuals. Furthermore, evidence in the record with respect to the individual defendants referred only to the negotiations for each separate license contract, the legality of which is assumed upon the present state of the record. Plaintiff, as shown, failed to establish a conspiracy to enter into the patent license contracts, nor is there evidence in the record of any deliberate intention of any of the individual defendants to violate the law.

It is inappropriate in a case like this to enjoin the individual defendants who are not parties to the patent license contracts but simply parties defendant in the case because they were officers of corporate defendants. We submit it is sufficient to enjoin the companies and their officers, directors, agents, servants and employees.

[fol. 280] Sec. V.

Section V of plaintiff's proposed decree provides that the defendants, in connection with the offering for sale, sale and distribution of gypsum products, be enjoined from entering into, continuing or carrying out any planned common course of action, undertaking or agreement to do or perform any of the things set forth in the numbered sub-paragraphs 1 to 10 thereof.

In the first place, plaintiff did not establish upon its motion for summary judgment that there was any planned common course of action, undertaking or agreement in the sale and distribution of gypsum products, nor did the Court, in directing summary judgment, determine anything more than that there came a time when the defendants admittedly, with knowledge of the adherence of the others, adhered to the price limitation provisions of the patent license contracts and thereby acted in concert to restrain trade and commerce in patented gypsum board, under the newly announced doctrine of the Supreme Court. This section proceeds upon the theory (1) that defendants were parties to a "conspiracy extrinsic to the plurality of licenses" and (2) that it included all products in the gypsum industry, which on both grounds is beyond the scope of the determination on the motion for summary judgment. It is directly in conflict with the prior findings of the court upon the same record that there was no such "conspiracy extrinsic to the plurality of licenses" and that plaintiff failed to establish its charges that defendants so restrained trade and commerce in the manufacture and sale of gypsum products.

In the second place, the numbered sub-paragraphs 1 to 10 cover not only every porduct in the industry but every activity in the sale and distribution of gypsum products wholly outside anything determined on the motion for summary judgment. Plaintiff seeks thereby to enjoin defendants from entering into or carrying out any planned common course of action, undertaking or agreement (1) to fix or make uniform prices, terms and conditions of sale of gypsum products of any kind, (2) to fix or make uniform gypsum products of any type or variety or the methods of manufacturing, selling, packaging, shipping, delivering or distributing the same (3) to refrain from the manufacture, sale or distribution of gypsum products of any type or variety or the method of manufacturing, selling, packaging, shipping, delivering or distributing the same (4) to refrain from selling or distributing gypsum products of any kind to any purchaser or class of purchasers, (5) to use or adhere to any basing point or delivered price system (6) to use, compile, circulate or exchange any information concerning transportation or delivery charges, (7) to use or adhere to

any basis for selection or classification of purchasers, (8) to use or adhere to any methods, means, conditions, practices, delivery points or areas, (9) to police, investigate or inquire [fol. 281] into prices, quantities, terms and conditions of sale or resale, and (10) to hold meetings or conferences for the purpose of aiding or assisting in maintaining uniform prices, terms and conditions of sale of gypsum products of any kind.

These provisions cover sales, production and distribution as to every possible activity with respect to every product in the industry, whether or not it is the subject matter of any charge in the complaint, is supported by any substantial evidence, or is within the scope of the final determination on the motion for summary judgment. They are also objectionable in that they assume the determination of every issue of fact in the case against the defendants notwithstanding the denials in the answers, the offers of proof and the prior findings of this Court upon the same record that they were not established by any substantial evidence.

The extent to which plaintiff would go is illustrated by sub-paragraph 5 of this Section V, wherein it seeks to enjoin defendants from agreeing upon or adhering to any system of quoting or selling gypsum products at prices calculated pursuant to or in accordance with a basing-point delivered price system or any other plan or system which results in identical price quotations or prices for gypsum products or which prevents purchasers from finding any advantage in price in dealing with one or more of the defendants against any other defendant. In short, the Government in this proposal presents the issue in the *Cement* case which took years to litigate and seeks a basing-point injunction in the gypsum industry, upon an issue not in the case, with no evidence to support it, and wholly outside the scope of the determination made upon the motion for summary judgment. Furthermore, the evidence of plaintiff on the charge that the defendants conspired to fix the prices of gypsum products and otherwise restrain trade in the industry, does not support such a provision in the decree, as this Court found upon the same record at the close of plaintiff's case. In view of the controversy with respect to the whole issue of any agreement or understanding to fix prices or in any other manner control or regulate the sale or distribution of gypsum prod-

ucts, the denials in the answers, the offers of proof, the failure of plaintiff's proof, and finally the findings of this Court that no such agreement or understanding existed, the provision is without any support in the present state of the record upon the motion for summary judgment.

The provisions of said Section V, sub-paragraphs 1-10 thereof, do not aim to protect the public interest with respect to the holding of this Court, that the defendants had acted in concert to restrain trade and commerce under the plurality of patent licenses, despite the assumed legality of each separate patent license contract, but on the contrary seek to enjoin the defendants against every imaginable wrong which might be committed under the Sherman Act and place the industry under a wholly unworkable decree. [fol. 282] The public interest will be protected in this case by canceling the patent license contracts and enjoining the defendant companies from exercising or adhering to any price limitation therein or in the bulletins issued under them, or from entering into or maintaining any plurality of patent license contracts with price limitation in the gypsum board industry to fix, maintain or stabilize prices on patented gypsum board or the terms and conditions of sale thereof.

Sec. VI

Section VI of plaintiff's proposed decree provides (1) that defendant USG be ordered to grant a non-exclusive license under some or all patents and applications now or hereafter owned or controlled by it relating to gypsum products, (2) that it be enjoined from disposing of any of its patents or patent applications unless the assignee agrees to observe the requirements of Sections VI and XI of the decree, (3) that it be enjoined from including any restriction or condition in any license except that the license may be non-transferable; a reasonable royalty may be charged but not measured by patent-free products; provision may be made for cancelation for failure to pay royalties: license must provide for cancelation by licensee on 30 days' notice; license must provide for benefit of any more favorable terms granted other licensees; and no provision may be made for inspection of books and records by USG, (4) that applicants may apply to the Court for determination of royalties and

USG shall have the burden of establishing the reasonableness of royalties requested by it, (5) that the Court may fix an interim royalty pending final determination and royalty rates finally determined shall become retroactive to date of application, and (6) that nothing in any such license shall prevent plaintiff or applicant from attacking validity or scope of patents.

The Government originally founded its charges upon an agreement or understanding among the defendants to raise and fix at arbitrary and non-competitive levels the prices of gypsum board and plaster and other miscellaneous gypsum products, carried out in part under the guise of numerous license agreements merely to give color of legality to the combination, which plaintiff wholly failed to prove as shown by the prior findings of this Court. The motion for summary judgment was decided upon the new theory that adherence by the defendants, in an entire industry, to the minimum price provisions of the patent license contracts, with knowledge of the adherence of the others, violates the Sherman Act. There is even a serious question if any such charge was made in the 127-page complaint filed by the Government where it spelled out in the greatest detail the charges made against the defendants. What is more important, there is no evidence in the case of any deliberate intent of the defendants to violate the Sherman Act, but on the contrary the record shows that they believed, and were [fol. 283] so advised by their counsel, that they had a right to enter into the patent license contracts and adhere to the price provisions therein. The *General Electric* case was so construed by the courts and the bar for more than twenty years until the decisions of the Supreme Court in this and the *Line Material* case repudiating or limiting the plainly declared doctrine of that case.

If the Supreme Court held that a mere plurality of such licenses industry-wide violated the Act, then plaintiff, upon its theory, is entitled to a decree consistent with the theory upon which the motion was made and granted, but it is not entitled to any punitive provisions, such as the provisions found in proposed Section VI. There is no foundation in this case for compulsory licensing

to all applicants under all patents and patent applications now or hereafter owned by USG relating to gypsum products, as provided in sub-paragraph 1 of this Section, nor for the provisions of sub-paragraphs 2 and 3 fastening a restriction to the sale of the patents to perpetuate an unwarranted control and to prevent USG from making any license with any conditions except those outlined therein, which provisions would strip the company of its property rights in all of its patents. These punitive provisions are not only unnecessary but they are unwarranted in a case like this. The cancellation of the presently existing license contracts, as suggested in our form of decree. Exhibit A, will satisfy the public interest and should satisfy the Attorney General, who represents that interest.

The construction of sub-paragraph 6 of this Section is doubtful, but if the Government means that a licensee may question the validity or scope of the patents covered by his license, we take exception to the suggestion, since it has no place in the decree in a case like this.

Defendant licensees relied upon the doctrine of the *General Electric* case, the same as the defendant licensor, and by the holding on the motion for summary judgment should not be deprived of their rights to manufacture and sell under the patents of USG included in their present patent license contracts. Their rights should be recognized in the decree by giving the licensees the right to take a non-exclusive license to make, use and sell patented gypsum plasterboard, lath and wallboard embodying the inventions of the same patents under which they are now licensed, at reasonable royalties to be agreed upon between the parties.

Sec. VII

Section VII of plaintiff's proposed decree provides for the cancellation of all patent license agreements, contracts, assignments and other arrangements relating to board, metalized board and perforated lath which have ever been entered into between USG and the other defendant companies and an injunction in equally broad terms. This is about the only provision of the proposed decree which [fol. 284] recognizes that the scope of the determination

upon the motion for summary judgment is the illegality of the plurality of patent license contracts, but at the same time it goes wholly outside the scope of the determination by seeking the cancellation of every contract, assignment and arrangement relating to patented board. No such provision is warranted within the scope of the final determination made in the case. If a decree is to be entered, a proper provision would be to declare the minimum price provisions of the patent license contracts illegal, cancel each of the contracts, and enjoin further performance thereunder.

Sec. VIII

Section VIII of plaintiff's proposed decree provides that the defendants shall be enjoined from conditioning the sale of any gypsum product upon the procurement by the purchaser of any other gypsum product or other products whatsoever from the defendants or from any other designated source. This provision is not only outside the scope of the determination upon the motion for summary judgment but is outside of any charge made in the complaint, nor is it warranted by any evidence in the case.

Sec. IX

Section IX of plaintiff's proposed decree provides that the defendants shall sell gypsum board to any other manufacturer of gypsum products at non-discriminatory prices, terms and conditions of sale, provided the board is available and the purchaser has proper credit rating, unless security or cash is furnished. This provision is not only outside the scope of the determination made upon the motion for summary judgment, but it is not covered by any charge made in the complaint or supported by any evidence in the case.

The evidence is clear that no manufacturer was ever denied the right to buy patented gypsum board. The Cardiff testimony was received, by the express ruling of the Court, alone upon the issue of whether the prices of plaster had been fixed by the defendants, an issue which this Court held was not established by plaintiff. Furthermore, the evidence in this respect was very unsatisfactory, as the Court will recall, and even if it had not been limited

to the issue above mentioned, it is insufficient to support such a decree upon the present state of the record, in face of the denials in the answers, the offers of proof and the prior findings of the court. With the cancellation of the license contracts and termination of all price limitation provisions, including requirement of consent to sell, there is no reason for such a provision as this.

The veiled meaning of the provision, whether intended or not, is disclosed by such phrases as: "gypsum board," [fol. 285] that is, patented or unpatented; "is then being or about to be offered or shall have been offered," that is, offered at any time to anybody; "available for such purposes," that is, merely for sale if offered to another, although plaintiff would have us believe it meant if the board was available; "shall not be required to sell unless it is offering, about to offer or has offered the type," that is, not to manufacturers but ever offered at any time to anybody in the United States: "sale is not required to be made without cash payment or security to any manufacturer * * * not having credit rating," that is, cash is not required but defendants must determine the credit of the customer at their peril; and "so long as the sale price at any one time is uniform to all buyers," that is, no matter what kind of trade, competition or other conditions there are which naturally would affect the price.

Sec. X

Section X of plaintiff's proposed decree, by sub-paragraphs 1 and 2 thereof, provides that the defendants be enjoined from acquiring, purchasing, acquiring and holding, or acquiring and controlling at any time the business or assets or capital stock or bonds of any other defendant, or the business or assets or any measure of control over the business of any competing company so engaged without the approval of the court. These provisions are not only outside the scope of the determination made upon the motion for summary judgment, but are outside any charge made in the complaint, any issue between the parties or any evidence in the record. There is not the slightest foundation for claiming in this case that purchases by the defendants of any gypsum properties were in any way improper or

made as the result of an agreement or understanding among the defendants, directly or indirectly, that they would be acquired.

Sub-paragraph 3 of this Section X provides that each of the individual defendants, while officers or directors of any of the defendant companies, be enjoined from acquiring, purchasing, acquiring and holding, or acquiring and controlling any measure of control through ownership of stock or bonds or otherwise of any competing company with the corporation of which he is an official unless the acquisition is approved by the Court. Here again is a provision which not only goes outside the scope of the determination made upon the motion for summary judgment but outside any charge made in the complaint, any issue between the parties or any evidence in the record. There is not the slightest foundation for any such provision in the decree.

Sec. XI

Section XI of plaintiff's proposed decree provides for (1) access by the Attorney General to all books and records of defendants relating to matters in the decree, and (2) [fols. 286-287] power by the Attorney General to interview officers and employees regarding any such matters. Such a provision is not necessary in a case like this for the protection of any public interest and, like practically all other provisions of the decree, goes outside the scope of the determination upon the motion for summary judgment, since it covers records and inquiries with respect to issues of fact not established by plaintiff, not included in the complaint, and in conflict with prior findings of the Court. The simple cancellation of the contracts is all that is necessary to support any proper decree in the case.

Sec. XII

Section XII of plaintiff's proposed decree seeks to tax all costs of the proceeding against defendants. The case was tried by the Government upon the theory that defendants had entered into a plan or agreement to fix prices and otherwise restrain trade and commerce in gypsum products in part by use of license contracts to give color of legality to the combination. In this plaintiff failed to establish its case.

It now relies upon a new theory advanced by the Supreme Court, which was not foreseen either by the defendants and their counsel or the Government and its counsel. In fact, there is a serious question if it is ever alleged in the complaint. Upon the theory which plaintiff now adopts upon its motion for summary judgment, no evidence was necessary to sustain its motion except those facts which the defendants never even denied. Furthermore, there was no actual or deliberate intent on the part of any of the defendants to violate the law, as shown under "Sec. VI" hereinabove.

We submit that it is unjust under these circumstances to tax all the costs against the defendants. The Government should bear a part of the taxable costs of the case.

Sec. XIII

Section XIII of plaintiff's proposed decree provides for the retention by the Court of jurisdiction for the entry of such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of the decree, and (2) for the enforcement of compliance therewith and the punishment of violations thereof. The form of this reservation is inappropriate in a case like this.

We suggest that jurisdiction be retained for the purpose of enabling any of the parties to the decree to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of the decree, for the modification or termination of any of the provisions thereof, and for the enforcement thereof.

[fol. 288] Respectfully submitted, Albert R. Connelly, Cranston Spray, Hugh Lynch, Attorneys for United States Gypsum Company, Sewell L. Avery and Oliver M. Knode.

March 4, 1949.

Exhibit A

[fol. 289] In the United States District Court for the District of Columbia

Civil Action No. 8017

United States of America, Plaintiff,

v.

United States Gypsum Company; National Gypsum Company; Certain-teed Products Corporation; The Celotex Corporation; Ebsary Gypsum Company, Inc.; Newark Plaster Company; Samuel M. Gloyd, Doing Business Under the Name of Texas Cement Plaster Company; Sewell L. Avery; Oliver M. Knode; Melvin H. Baker; Henry J. Hartley; and Frederick Tomkins, Defendants

Decree

This cause came on for trial before this Court on November 15, 1943 and, at the end of the plaintiff's case, upon motion of the defendants pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, judgment was entered dismissing the complaint on its merits on August 5, 1946. That judgment was reversed by the Supreme Court of the United States, and the case was remanded to this Court for further proceedings in conformity with the opinion of the Supreme Court (333 U. S. 683).

This cause having now come on to be further heard upon the motion of plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in its favor upon the pleadings and all of the proceedings heretofore had herein or, in the alternative, for such further proceedings as the Court might order; and the Court having considered the pleadings and all the proceedings heretofore had herein including, but not limited to, all exhibits and testimony of witnesses, admissions by counsel for the defendants, and the offers of proof submitted by certain of the defendants, having read and considered the briefs submitted by the respective parties, having heard and considered oral argument of counsel for the respective parties; and the Court having found that under the aforesaid

opinion of the Supreme Court, as construed by it, the defendants, by adhering to the minimum price provisions of the patent license agreements, in an entire industry, with knowledge of the adherence thereto of the others, thereby [fol. 290] acted in concert to restrain trade and commerce among the several states in the eastern territory of the United States and that there is no genuine issue as to any fact material to that finding;

Now, therefore, upon motion of plaintiff, it is hereby

Ordered, adjudged and decreed that:

Article I

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states a cause of action against defendants under the Act of Congress of July 2, 1890, entitled "An Act To Protect Trade and Commerce Against Unlawful Restraints and Monopolies", commonly known as the Sherman Antitrust Act, and acts amendatory thereof and supplemental thereto.

Article II

As used in this decree:

1. "Defendant companies" shall mean all of the corporate defendants and Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company.

2. The "Patents" shall mean United States Letters Patent and applications for United States Letters Patent owned by defendant United States Gypsum Company which are described in the Patent Licenses, as hereinafter defined, and continuations in whole or in part, renewals, reissues, divisions, and extensions thereof.

3. "Gypsum board" shall mean plaster board or lath (including perforated and metallized lath) and wallboard (including metallized wallboard) made from gypsum and embodying any of the inventions or improvements set forth and claimed in any of the Patents.

4. "Minimum price provisions" shall mean and include: (a) any provision contained in a patent license

agreement constituting an agreement, reservation of right, or license limitation with respect to the price or other terms or conditions of sale of gypsum board; and (b) any price bulletin or other notice or communication issued pursuant to any such provision.

5. "Patent Licenses" shall mean the patent license agreements which were in effect between defendant United States Gypsum Company and each of the other defendant companies at the time the complaint herein was filed and described in said complaint, namely, the following:

Agreement dated October 15, 1929, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee;

Agreement dated October 17, 1929, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee;

[fol. 291] Agreement dated October 18, 1929, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee;

Agreement dated November 5, 1929, between United States Gypsum Company, as licensor, and Universal Gypsum and Lime Company (National Gypsum Company, as Assignee), as licensee;

Agreement dated November 25, 1929, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee;

Agreement dated April 23, 1930, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Co., as Assignee), as licensee;

Agreement dated February 10, 1937, between United States Gypsum Company, as licensor, and Texas Cement Plaster Company, as licensee;

Agreement dated October 5, 1934, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee (Metallized board);

Agreement dated October 12, 1934, between United States Gypsum Company, as licensor, and Kelley

Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Metallized board);

Agreement dated November 2, 1934, between United States Gypsum Company as licensor, and Certain-teed Products Corporation, as licensee (Metallized board);

Agreement dated December 4, 1934, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee (Metallized board);

Agreement dated August 14, 1935, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Metallized board);

Agreement dated June 8, 1936, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

Agreement dated February 2, 1937, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated June 23, 1937, between United States Gypsum Company, as licensor, and Kelley [fol. 292] Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Perforated lath);

Agreement dated January 3, 1939, between United States Gypsum Company, as licensor, and Newark Plaster Company, as licensee (Perforated lath).

Article III

The defendant companies, by adhering to the minimum price provisions of the Patent Licenses, in an entire industry, with knowledge of the adherence thereto of the others,

have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board, in violation of Section 1 of the Sherman Antitrust Act.

Article IV

1. The minimum price provisions of the Patent Licenses are hereby declared to be illegal.

2. Each of the Patent Licenses is hereby cancelled and terminated.

Article V

Each of the defendant companies and each of their respective officers, directors, agents, employees, representatives, subsidiaries, and any person acting or claiming to act under, through or for them or any of them are hereby enjoined and restrained from:

(1) the further performance or enforcement of any of the minimum price provisions of the Patent Licenses, including any price bulletin issued thereunder;

(2) entering into or performing any agreement or understanding among the defendants or any of them for the purpose or with the effect of continuing, reviving or reinstating any of the minimum price provisions of the Patent Licenses; and

(3) entering into or performing any agreement or understanding among the defendants or any of them in restraint of trade and commerce in gypsum board among the several states in the eastern territory of the United States by license agreements with minimum price provisions to fix, maintain or stabilize prices of gypsum board or the terms and conditions of sale thereof.

Article VI

In recognition of the fact that the defendant companies other than defendant United States Gypsum Company, in their manufacture and sale of gypsum board, have relied upon their respective Patent Licenses to use the patents [fols. 293-294] therein described, said defendant United States Gypsum Company shall grant to each of the other

defendant companies which shall apply therefor within sixty (60) days from the date of this decree, in lieu of any such Patent License held by it, an indivisible and non-exclusive license, retroactive to the date of this decree, to make, use and vend gypsum board under any of the unexpired patents described in such Patent License, upon royalties and other terms and conditions not less favorable to such other defendant company than those contained in such Patent License, but without minimum price provisions. The forms of license agreement which the Court has this day ordered filed herein are hereby approved; and the tender by defendant United States Gypsum Company to any such other defendant company of a license agreement containing the terms and conditions set forth in the applicable filed form or forms shall constitute compliance by defendant United States Gypsum Company with the provisions of this Article VI.

Article VII

This decree shall have no effect with respect to defendants' acts and operations without the United States, or to their acts and operations within the United States relating exclusively to acts without the United States; nor shall it have any effect with respect to operations or activities, wherever performed, which are authorized or permitted by the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or by the Act of Congress of August 17, 1937, commonly called the Miller-Tydings Act, or by any present or future act of Congress or amendment thereto.

Article VIII

Jurisdiction of this cause is retained by the Court for the purpose of enabling any of the parties to this decree, or any other person, firm or corporation bound by any of the provisions hereof, to apply to the Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this decree, for the modification or termination of any of the provisions thereof and for the enforcement of compliance therewith.

Article IX

Judgment is entered against the defendants for % of the costs to be taxed in this proceeding.

March , 1949.

——— ———.

[fol. 295] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

OBJECTIONS OF DEFENDANT, CERTAIN-TEED PRODUCTS CORPORATION, TO PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed March 3, 1949

Defendant Certain-teed Products Corporation hereby concurs in and adopts the objections filed with this Court by Defendant United States Gypsum Company to Plaintiff's Proposed Findings of Fact and Conclusions of Law. This Defendant further concurs in and adopts the argument made and the cases cited in support of such Objections in Memorandum of Defendant United States Gypsum Com-
[fol. 296] pany in Opposition to Plaintiff's Proposed Findings of Fact, Conclusions of Law, and Decree.

March 4, 1949.

Respectfully submitted, Herbert W. Hirsh, Norman A. Miller, Charlton Ogburn, Investment Building, Washington 5, D. C., Attorneys for Defendant, Certain-teed Products Corporation.

CERTIFICATE OF SERVICE (Omitted in Printing)

[fol. 297] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

OBJECTIONS OF DEFENDANT, CERTAIN-TEED PRODUCTS CORPORATION, IN OPPOSITION TO PLAINTIFF'S PROPOSED DECREE—Filed March 3, 1949

Defendant Certain-teed Products Corporation hereby concurs in and adopts the Objections filed with this Court by Defendant United States Gypsum Company to Sections II to V, both inclusive, and VIII to XIII, both inclusive, of Plaintiff's Proposed Decree. This Defendant further concurs in and adopts the argument made and the cases cited [fol. 298] in support of such Objections in the Memorandum of Defendant United States Gypsum Company in Opposition to Plaintiff's Proposed Findings of Fact, Conclusions of Law and Decree.

With regard to Sections VI and VII of Plaintiff's Proposed Decree, Defendant Certain-teed Products Corporation offers no objections thereto, but submits its interests to this Court for an equitable and just determination.

March 3, 1949.

Respectfully submitted, Herbert W. Hirsh, Norman A. Miller, Charlton Ogburn, Investment Bldg., Washington 5, D. C., Attorneys for Defendant, Certain-teed Products Corporation.

CERTIFICATE OF SERVICE (Omitted in Printing)

[fol. 299] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MEMORANDUM SUBMITTED ON BEHALF OF DEFENDANTS, NEWARK PLASTER COMPANY AND FREDERICK TOMKINS, ON THE FORM OF THE FINDINGS, CONCLUSIONS AND DECREE TO BE ENTERED IN THIS ACTION—Filed March 4, 1949

With the exception hereinafter set forth, these defendants join with defendant United States Gypsum Company in opposing all the provisions of the decree submitted by plaintiff upon the motion for summary judgment herein.

Defendant United States Gypsum Company has submitted to these defendants a form of decree, marked Exhibit A, annexed to the memorandum to be submitted by it in opposition to the decree proposed by the plaintiff, which provides in Article VI thereof for the licensing by defendant United States Gypsum Company of the other defendants herein and the approval in the decree of forms of license agreements. The forms of these license agreements which defendant United States Gypsum Company desires [fol. 300] approved by the Court in the decree have not as yet been submitted to these defendants and these defendants, therefore, cannot approve of Article VI of the decree proposed by defendant United States Gypsum Company.

If these defendants do not agree with defendant United States Gypsum Company on the form of the license agreements prior to the date of the oral argument on the form of the decree herein, then these defendants ask that the provisions of Article VI of the plaintiff's decree be substituted for Article VI of the decree proposed by defendant United States Gypsum Company.

Except for the objection, as aforesaid, to Article VI of the decree proposed by defendant United States Gypsum Company, these defendants join with defendant United States Gypsum Company in proposing the other articles of Exhibit A as part of the decree which gives plaintiff the relief to which it may reasonably be held entitled under the decision of this Court.

If the Court should conclude to make separate findings

of fact and conclusions of law, then these defendants join with defendant United States Gypsum Company in requesting that the Court make the findings of fact and conclusions of law set forth in Exhibit B annexed to the memorandum to be submitted on behalf of defendant United States Gyp-
[fol. 301] sum Company in opposition to plaintiff's proposed findings of fact and conclusions of law.

In any event, these defendants respectfully ask that they be given an opportunity to be heard orally by the Court on the form of the decree to be entered herein.

Respectfully submitted, (S.) Benjamin P. DeWitt, Attorney for Defendants Newark Plaster Company and Frederick Tomkins.

[fol. 302] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MEMORANDUM OF DEFENDANTS, NATIONAL GYPSUM COMPANY AND MELVIN H. BAKER, IN OPPOSITION TO PLAINTIFF'S PROPOSED FINDINGS, CONCLUSIONS AND DECREE—Filed March 4, 1949

This memorandum is submitted by the defendants National Gypsum Company and Melvin H. Baker in opposition to the proposed findings of fact, conclusions of law and decree submitted by plaintiff upon the motion for summary judgment herein. Defendants object generally to such proposed findings, conclusions and decree upon the ground that they go far beyond the scope of the issues determined by this Court upon plaintiff's motion for summary judgment. In addition, such proposed findings, conclusions and decree are specifically objectionable upon grounds hereinafter stated.

[fol. 303]

I

Objections to Proposed Findings and Conclusions

Counsel for defendants National Gypsum Company and Melvin H. Baker have read the objections of defendant United States Gypsum Company to the proposed findings

of fact and conclusions of law and concur in the views expressed therein.

In addition to the objections made by defendant United States Gypsum Company to the proposed conclusions of law, defendants National Gypsum Company and Melvin H. Baker make the following objections:

1. Proposed conclusion #5 erroneously and argumentatively re-defines the *General Electric Case.* Such collateral attack attenuating the principle of the *General Electric Case* should not be permitted. Further emasculation of the principle established by the *General Electric Case,* if it is to occur, should come only at the hands of a Court where the question is in issue. It is outside the scope of the issue before this Court.

2. *By innuendo,* proposed conclusion #8 asserts issues and facts not necessary to this decision. The paragraph [fol. 304] *assumes* all the recited allegations obtain in this case even though the findings and evidence do not support such an assumption.

No finding, nor any substantial evidence, support the assumptions: That "The industry is completely regimented; that "a class of distributors (was squeezed out"; that "resale prices of another class of distributors (were) fixed," and that "the prices of unpatented products (were) stabilized." See also the objections to the comparable proposed findings of fact set forth in the memorandum of defendant United States Gypsum Company.

3. In proposed conclusion #9, as in proposed conclusion #5, plaintiff attempts to secure a needless and fallacious interpretation of the Supreme Court's decision in the *Gypsum Case* and *Line Material Case.*

4. Proposed conclusion #10 is objectionable for the same reasons as proposed conclusions #5 and #9. Plaintiff seeks an unnecessary and controversial extension of the holding in the *Line Material Case.* This proposed conclusion is not an issue here. It springs from a mistaken interpretation of the *Gypsum* and *Line Material* decisions. Certainly the Supreme Court did not intimate in the *Gypsum Case* that the purchase of the starch patents from Universal constituted a *per se violation* of Antitrust statutes.

5. Proposed conclusion 11 is an inaccurate and insinu-
[fol. 305] ating attempt to attack the acknowledged *bona fides* of defendants in entering into license agreements. These agreements were not entered *"for the purpose of organizing the industry and stabilizing prices."* By means of such contentious conclusions plaintiff is endeavoring to secure the effect of adjudications on matters not in issue for the purposes of this judgment and decree.

6. Proposed conclusion #12 is objectionable for the same reasons stated in the objections to proposed conclusion #8. The assumptions of fact made in proposed paragraphs #12(a), (b), (e) and (f) are neither supported by the findings nor by subtsantial evidence. Proposed paragraph #12(c) should be eliminated as being outside the issue determined by this Court on the motion for summary judgment.

7. Proposed conclusion #13 should be amended to mirror the changes required in proposed conclusion #12. Furthermore, #13(d) is an inference objectionable as contrary to the findings of fact and without any substantial foundation in the body of evidence.

8. Proposed conclusion #16 is an unjustifiable attempt to expand the scope of the judgment rendered by this Court upon plaintiff's motion. In arguing the motion, which was based solely on the issue of price control through the
[fol. 306] license agreements, Mr. Steffen said:

> "This morning I clearly said, or tried to say, that for purposes of this action, this motion, we can limit our case to price control. *The facts are admitted on that point alone."* (Italics ours) (R. 7916).

The judgment of this Court (Jackson, J.) was restricted to that point:

> "It is my opinion that if everything should be testified to, which is in proffer of proof, it would not bring any change in the decision of the Supreme Court *on the fundamental question involved."* (Italics ours) (R. 7935).

The fundamental issue was, of course, whether defendants associated themselves in an industry-wide plan to organ-

ize the industry under patent licenses and stabilize prices by entering into patent agreements containing price-fixing provisions. Plaintiff's motion was decided upon that issue.

Now plaintiff is seeking to stretch that adjudication to cover the unsupported charge that defendants have suppressed non-price competition at the service and quality levels. Such unsanctioned extension should not be countenanced by this Court.

9. Proposed conclusion #17 is an objectionable and argumentive inference without a basis in fact or evidence and is outside the scope of the issue before this Court. Defendants' lack of intent to violate the Federal Antitrust Laws does not indicate any proclivity on the part of defendants to violate the law nor indicate any reasonable likelihood that illegal restraints and monopolization will be continued [fol. 307] or resumed. The disputatious proposed conclusion is both improper and erroneous.

II

The nature of this case and the applicable principles of law

The complaint charged that defendants violated Sections 1 and 2 of the Sherman Act by conspiring to fix prices of patented gypsum board through patent license agreements under which patentee United States Gypsum Company granted to other gypsum manufacturers non-discriminatory licenses to manufacture and sell patented gypsum board, reserving to itself the right to determine and fix the price of all patented gypsum board sold.

The evidence shows that the licensees, convinced that such an arrangement was not violative of any State or Federal Law nor contrary to any public policy, openly and in good faith entered into patent license agreements offered generally to the gypsum industry. The error of the defendants "stemmed logically from (their) understanding of *United States* v. *General Electric*, 276 U.S. 476". Under such circumstances, an unduly stringent and punitive decree is not required to prevent future violations by these defendants, nor is such a decree necessary to restore competitive conditions to the gypsum industry.

[fol. 308] The decree should be remedial and not punitive in nature; it should not be more drastic than the facts of

the case and the law demand; and it should enjoin only the unlawful practices and take such reasonable measures as would preclude their revival. See *United States* v. *E. I. DuPont deNemours & Co.*, 188 Fed. 127, 153; *Swift* v. *United States*, 196 U. S. 375, 396; *Local 167* v. *United States*, 291 U. S. 293, 299; *Ethyl Gasoline Corporation* v. *United States*, 309 U. S. 436, 461; and *United States* v. *National Lead Co.*, 332 U. S. 319.

The proposed decree is apparently based on the theory that plaintiff is entitled to a decree punishing defendants for every conceivable infraction of the Federal Antitrust Laws, even though such infractions were not alleged nor proved nor in issue in this case.

In granting plaintiff's motion, this Court, per Garrett, J. said:

> "Hence, I think the summary judgment should be granted, but I take the precaution to say that the decree following the summary judgment, if it comes or when it does come, must be examined with great care because *it should not include matters which were not in issue before the Supreme Court.*" (Italics ours) (R. 7935).

Amplifying this statement, Judge Stephens said:

> "It occurs to me, Mr. Steffen, in view of the victory you have now so fully won, that you might be able to content yourself with a decree which reflects the views of my colleagues on the subject of conspiracy to execute and take patent licenses for the purpose of organizing the industry and stabilizing prices, and on the subject of monopoly, and that you might not need to [fol. 309] trouble yourselves or the Court with the difficulties about jobbers and high prices and arbitrary prices of the patented board or with respect to unpatented materials or with respect to manufacturing distributors." (R. 7938).

III

Objections to Proposed Decree

Defendants National Gypsum Company and Melvin H. Baker make the following objections:

1. *Proposed Article III*—This proposed Article should be limited to the issue determined by this Court. Therefore, the term "said defendants" should be omitted and the term "corporate defendants" inserted in lieu thereof. The term "gypsum products" should be omitted and the term "gypsum board" inserted in lieu thereof.

2. *Proposed Article IV*—The inclusion of "attorneys" is improper and unnecessary. A decree applicable only to the corporate defendants, its officers, directors, employees and agents will be sufficient to protect the public interest.

3. *Proposed Article V*—Amendments should be made to the preamble: *First*, the injunctive provisions should apply only to the corporate defendants. The proof of the price-[fol. 310] fixing combination was limited to the corporate defendants alone.

Second, the injunctive provisions should only apply to the offering for sale, sale, and distribution of gypsum board. It was only as to gypsum board that the price-fixing combination was found to exist. Wherever the term "gypsum products" appears in this proposed Article, the term "gypsum board" should be inserted in lieu thereof.

Third, the injunctive provisions should only apply where the planned common course of action, etc. restrains trade. After the words "restrained from" the words "*restraining trade in gypsum board among the several states of the United States by*" should be inserted.

Fourth, the phrase "others not parties hereto" will unnecessarily hamper and harass legitimate business practices. The phrase is too broad and ambiguous, especially when read as a preface to the several proposed paragraphs of proposed Article V. In lieu of that uncertain phrase, "*other manufacturers of gypsum board*" should be inserted.

Proposed paragraph (1)—The inclusion of the phrase "or resold" is an unwarranted restriction of the rights extended by the Miller-Tydings Act. The decree should

provide that nothing therein shall be deemed to diminish the rights of defendants to conduct operations or activities [fol. 311] exempted from the operation of the Federal Antitrust Laws by the Miller-Tydings Act, the Webb-Pomerene Act or by any other Act.

Proposed paragraphs (2) and (3)—These proposed paragraphs should be rewritten. They unduly and unnecessarily circumscribe ordinary and legitimate business transactions. For instance, in a license agreement complying with the provisions of proposed Article VI, licensor and licensee *agree* that licensee may or will manufacture and sell a certain type or variety of gypsum product. As a direct result of the license agreement, licensor and licensee will, to a considerable degree, necessarily manufacture and sell a more or less uniform product, a product for which the consuming public has evidenced a preference. Such conduct, sanctioned under proposed Article VI, should not violate proposed Article V. In fact, the very purpose of the compulsory licensing provisions is to continue to permit a gypsum manufacturer to manufacture and sell the same improved product which his competitor-licensor is selling.

Standardization of gypsum products occurs primarily not from any agreement or understanding among the gypsum manufacturers, but rather comes about as a result of the demonstrated preferences of the buying public for a particular type or variety of product. An alert, competitive gypsum manufacturer must minister to his customers' desires. Naturally enough, he strives to provide his customers with the desired type or variety of product. Such [fol. 312] competitive selling should not be proscribed by this decree.

In addition, in each of these proposed paragraphs it is not clear whether the limitation clause "for the purpose of etc." applies to the whole proposed paragraph or only to that part following the semi-colon. It should limit the entire proposed paragraph.

Proposed paragraph (5)—This proposed paragraph should be wholly deleted as unnecessary. The instant situation is clearly different from that in the *Cement Case*. In the *Cement Case* a basing point delivered price system was the central cog in a *willful* scheme employed by the cement

manufacturers to fix the prices of *unpatented* goods in violation of the Federal Antitrust Laws. In this case, the use of basing points was merely *incidental* to the exercise of the hitherto unquestioned and unrestricted rights of a patentee to fix the price at which his licensee might sell the *patented* product. An injunction against basing point pricing, justified in the *Cement Case*, is inappropriate here. Moreover, proposed paragraph (1) is, by itself, sufficient to enjoin the evil of price-fixing.

Proposed paragraph (6)—Similarly, we object to this as unnecessary in view of proposed paragraph (1), and as inappropriate in that the use of rate books etc. was merely an *incidental* means of fixing the licensees' minimum [fol. 313] prices under the existing patent license agreements.

Proposed paragraphs (7) and (8)—These proposed paragraphs are unnecessary and improper for the same general reasons as applied to proposed paragraphs (5) and (6).

Proposed paragraph (9)—The term "or resale" should be deleted. The contentious term "uniform prices" should be defined to mean uniform *delivered* prices.

Furthermore, the decree should make clear that nothing therein shall be deemed to prevent any defendant from inquiring into his competitors' prices to enable him to meet a competing price so long as such inquiry does not have the purpose or effect of restraining competition. Such competitive selling is the essence of competition and should be encouraged.

4. *Proposed Articles VI and VII*—The licensee defendants have in good faith entered into the existing patent license agreements and have equipped their plants for the manufacture of the patented gypsum products in reliance on the contractual rights secured under such agreements. Insofar as any such rights do not collide with the Sherman Act, licensee defendants should not be deprived of such rights. A divestiture of such rights by the final decree would in these circumstances, be unwise, uneconomic and unjust.

[fol. 314] Therefore, if feasible, the present agreements should continue in effect with only the offending provisions deleted. If this is not practicable and the agreements are

to be cancelled *in toto*, the licensees should be assured against any diminution of those rights. Defendants National Gypsum Company and Melvin H. Baker are in accord with the principal provisions of the proposed Article VI as being reasonably designed to preserve such rights to defendant licensees. However, in the event of total cancellation, in order to insure retention of all the non-offending rights and privileges secured by licensees under the existing agreements, the decree should provide that each such license contain all features of the existing licenses which do not violate the Sherman Act.

Moreover, if total cancellation of the existing license agreements is decreed, the decree should include a schedule of all the agreements that are intended to be cancelled thereby.

5. *Proposed Article VIII*—This proposed Article should be deleted as unnecessary and not in issue before this Court or the Supreme Court. No such violation was found or alleged.

6. *Proposed Article IX*—This proposed Article should be deleted as unnecessary, not in issue before this Court, and contrary to the findings of fact. Moreover, the terms "available" and "uniform" demand definition.

[fol. 315] 7. *Proposed Article X*—This proposed Article should be entirely deleted as being unnecessary and outside the scope of the issue before this Court. It is apparently based on the assumption that defendants have been found to have violated Section 7 of the Clayton Act. No such violation was ever alleged. There is no evidence tending to support such an allegation. Neither this Court nor the Supreme Court found such a violation.

The proposed Article overreaches the provisions of the Clayton Act Section 7. Acquisitions of "the business or assets . . . or bonds" or of "any measure of control . . . by ownership . . . of bonds or otherwise" of any other defendant or competitor are enjoined by this proposal. The Clayton Act Section 7 applies only to acquisitions of "stock or other share capital" where injury to commerce results. There is no need for such unwarranted and unnecessary extension of the statutory provisions in these circumstances where no Section 7 violation has been alleged or proved.

Moreover, the term "any measure of control" requires definition.

The provisions herein enjoining acquisitions of assets or bonds are inconsistent with the mandate of proposed Article IX which requires the cash or credit sale of certain assets "to any other manufacturer of gypsum products."

[fol. 316] When a violation of Section 7 of the Clayton Act is alleged, it rests with the plaintiff to show that a substantial lessening of competition or a restraint of commerce or a monopoly will be effected as a result of defendant's conduct. Here, though no such violation has ever been in issue, plaintiff, by the injunction in proposed paragraph (1), seeks to obviate the requirement for such proof as to certain acquisitions by defendants. Neither the facts nor the Clayton Act warrant such an injunction. Acquisitions should be permitted so long as no injury to commerce result therefrom.

Proposed paragraphs (2) and (3) also strive to whittle away the requirements of proof. Plaintiff attempts, in effect, to shift to defendants the burden of proof on the question of Section 7 violation. In the absence of any allegation or proof of violation and in the absence of a demonstrated propensity or willful intent to violate the Antitrust Laws, such a shifting of the burden of proof is both unfair and indefensible.

8. *Proposed Article XI*—This proposed Article is wholly unnecessary for the protection of the public interest and should be deleted from the decree. The power of the Attorney-General to subpoena records is by itself sufficient. The proposed Article also is inappropriately broad in that it covers records and inquiries with respect to issues of fact not established by plaintiff.

[fol. 317] In any event any right of access granted herein should be limited to the books, ledgers etc. of the corporate defendants. Moreover, this proposed Article should require that, before the Attorney-General is permitted access to the books, ledgers etc. of any corporate defendant, appropriate request and notice be made in writing to the principal office of such defendant and that the interview of employees, etc. be made "subject to the reasonable convenience of such defendant."

9. *Proposed Article XII*—The proposal to tax all costs in

this action to defendants is unjust in the circumstances of this case. Plaintiff has failed to sustain many of the charges originally asserted in this action. The decision of the Supreme Court reversing this Court made a broad departure from established precedent. Acting in good faith, defendants relied on well-established legal doctrine in entering the license agreements. This Court should therefore in its discretion equitably pro-rate the costs of this action among plaintiff and the several defendants.

Respectfully submitted, Elmer E. Finck, Finck & Huber, Attorneys for National Gypsum Company and Melvin H. Baker

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[fol. 318] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

OBJECTIONS OF DEFENDANT, THE CELOTEX CORPORATION, IN OPPOSITION TO PLAINTIFF'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE—Filed March 4, 1949

Defendant, The Celotex Corporation, hereby adopts the objections, arguments and authorities contained in the Memorandum of Defendant, United States Gypsum Company, in opposition to Plaintiff's Proposed Findings of Fact, Conclusions of Law and Decree, filed with this Court, except the objections, arguments and authorities contained in said Memorandum which pertain and apply to Sections VI and VII of Plaintiff's proposed Decree.

Defendant, The Celotex Corporation, offers no objections to Sections VI and VII of Plaintiff's proposed Decree but submits its interest in this regard to this Court for an equitable determination, and requests an opportunity to be heard orally by the Court.

March 4, 1949.

Respectfully submitted, Andrew J. Dallstream, Walter G. Moyle, Norman Waite, Ralph P. Wanlass, Attorneys for Defendant, The Celotex Corporation.

[fols. 319-320] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MEMORANDUM OF THE DEFENDANT, SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY, IN RESPONSE TO THE PROPOSED FINDINGS, CONCLUSIONS AND DECREE HERETOFORE SUBMITTED BY THE PLAINTIFF—Filed March 4, 1949.

The defendant, Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company, adopts the memorandum filed by the defendant, United States Gypsum Company, in opposition to the proposed findings, conclusions and decree of the plaintiff, which memorandum contains Exhibit A, being a suggested form of decree, and Exhibit B, findings of fact and conclusions of law.

Geo. E. H. Goodner, Munsey Building, Washington, D. C., D. I. Johnston, 824 Commerce Exchange Building, Oklahoma City, Oklahoma, Attorneys for Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company.

[fol. 321] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MEMORANDUM OF DEFENDANTS, EBSARY GYPSUM COMPANY, INC. AND FREDERICK G. EBSARY, IN OPPOSITION TO PLAINTIFF'S PROPOSED FINDINGS, CONCLUSIONS AND DECREE—Filed March 7, 1949

The plaintiff has submitted proposed findings of fact, conclusions of law, and a decree which go beyond the necessities and ordinary results following the decision of the motion for summary judgment.

Findings of fact and conclusions of law have heretofore been made by this court in this action. A different result

which may have been arrived at upon appeal is supported by the decision and opinion in that appeal. New findings and conclusions are unnecessary. The form and substance of the decree should be the only questions for settlement.

Defendants object to the proposed findings, conclusions and decree generally upon the ground that they go beyond the scope of the issues determined by the court upon the [fol. 322] motion for summary judgment, and specifically upon the grounds hereinafter mentioned or referred to.

I

The Proposed Findings of Fact and Conclusions of Law

Counsel for defendants Ebsary Gypsum Company, Inc. and Frederick G. Ebsary has read the proposed memorandum of the defendant United States Gypsum Company in opposition to the proposed findings, conclusions and decree of the plaintiff, and as to the objections to the proposed findings of fact, concurs in the views expressed therein.

It should be sufficient as conclusions of law to state that the court has jurisdiction of the action; that the defendants, by entering into and performing under the particular patent license agreements, acted in restraint of trade or commerce among the several states with respect to gypsum board in violation of Section 1 of the Sherman Anti-Trust Act; and that the plaintiff is entitled to judgment on that issue. Anything beyond that would not be within the issues determined.

II

The Proposed Decree

In the recitals in the proposed decree of the plaintiff, references to Section 2 of the Sherman Anti-Trust Act should be eliminated.

Proposed Article I. This is a conclusion, and is unnecessary and superfluous in the decree.

[fol. 323] *Proposed Article III.* This is a conclusion, and is unnecessary and superfluous in the decree, and should in any event be limited to the corporate defendants and should not include the individual defendants, and should be

limited to gypsum board and not specify gypsum products.

Proposed Article IV. This is too broad in its scope. It should not include the individual defendants, nor should it include the defendants' attorneys.

Proposed Article V. The injunctive provisions should be limited to the corporate defendants. Paragraph 5, thereunder has to do with the basing-point delivery price, which was not an issue in this action and should be eliminated in its entirety. Paragraph 6. thereunder refers to dissemination of information and any restriction thereon is totally unwarranted and improper for any purpose. This paragraph should be entirely eliminated.

Proposed Article VIII. This was not an issue, and restricts the freedom of contract and sale and the right to determine with whom the defendants will do business. It should be eliminated in its entirety.

Proposed Article IX. This was not within the issues.

Proposed Article X. This should be eliminated in its entirety. The matter contained therein was not within the issues in the action. It restrains the ordinary lawful individual or corporate ownership of securities, interests and property.

Proposed Article XI. This should have no part in the decree, and is wholly unnecessary. Compliance with the decree can be secured by the attorney general by virtue of the means already given him by statute and the use of subpoena. In any event, a right to inspect books and papers should be limited to the corporate defendants.

[fols. 324-325] *Proposed Article XII.* The costs should be equitably divided between the plaintiff and the defendants, so that the plaintiff would bear one-half thereof. As between the defendants there should be a ratable division based upon some pertinent facts, such as their relative size, or relative amounts of business done, as in the year 1939, or upon some other equitable basis.

Respectfully submitted, Joseph S. Rippey, Attorney for Defendants Ebsary Gypsum Company, Inc. and Frederick G. Ebsary.

[fol. 326] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

HOLDING A THREE JUDGE COURT

Civil Action No. 8017

[Title omitted]

REPORTER'S TRANSCRIPT OF HEARING ON PROPOSED FINDINGS OF FACT, ETC., OF JUNE 13, 1949

Court Room, U. S. Court of Customs and Patent Appeals, Washington, D. C., Monday, June 13, 1949.

The above-entitled cause came on for oral argument upon the proposed findings of fact, conclusions of law, and decree, at 10:00 a.m., pursuant to notice, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

[fol. 327] APPEARANCES:

On behalf of the plaintiff:

Edward Knuff, Esq., and Roscoe T. Steffen, Esq., Special Assistants to the Attorney General.

On behalf of the defendants:

Albert R. Connelly, Esq., Cranston Spray, Esq., Murray W. McEniry, Esq., and Hugh Lynch, Jr., Esq., for the defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode.

Charlton Ogburn, Esq., and Norman A. Miller, Esq., for the defendant Certain-teed Products Corporation.

Ralph Wanlass, Esq., and Andrew Dallstream, Esq., for the defendant The Celotex Corporation.

D. I. Johnston, Esq., for the defendant Samuel M. Gloyd, doing business under the trade name of Texas Cement Plaster Company.

Joseph S. Rippey, Esq., for the defendants Ebsary Gypsum Company and Frederick G. Ebsary.
Benjamin P. De Witt, Esq., for the defendant Newark Plaster Company.
Elmer Finck, Esq., for the defendant National Gypsum Company.

[fol. 328] PROCEEDINGS

Chief Judge Stephens: The court is in session for the purpose of hearing argument on the proposed findings of fact and conclusions of law and decree to be entered upon a summary judgment, which by a majority vote of this court was to be entered in this case.

How much time do you think you will need, Mr. Knuff, to present your views?

Mr. Knuff: I would think an hour and a half to two hours, if the court did not hold me too strictly to that time, would be sufficient, your Honor.

Chief Judge Stephens: How much time do you think you will need, gentlemen, for the defendants?

Mr. Connelly: Speaking for the defendant United States Gypsum Company, certainly not more than an hour and a half to two hours.

Chief Judge Stephens: And will the other defendants wish to speak at length or not? I am not asking these questions with the view of unduly shortening your time, but simply to get some estimate of the amount of time likely to be required.

Mr. Finck: If your Honor please, I will probably need 20 to 25 minutes.

Mr. DeWitt: Your Honor, speaking for the Newark Plaster Company, what I shall need will depend on what is said. I do not believe I will need more than 20 minutes [fol. 329] to a half hour at the most.

Chief Judge Stephens: I shall have to announce that it will be necessary to conclude the case tomorrow. It will not be possible for the court to sit beyond tomorrow, and if it is possible to conclude it with fairness to all concerned today, that would be desirable.

We will not sit, then, in view of the announcement of

counsel, with a specific limit on time. We will allow that to be fixed as we go along.

You may proceed, then, Mr. Knuff.

May I ask, before you proceed: I find on my desk this morning an additional mimeographed motion for summary judgment or memorandum thereon with accompanying papers on the amended final judgment. Is this something in addition to what you have already presented?

Mr. Knuff: No, we have already presented that memorandum, as of June 29, 1948. I intend to refer to it in my oral statement, and I thought possibly the court might want to follow what I have to say by having it before them.

Chief Judge Stephens: Thank you.

Opening Argument on Behalf of the Plaintiff

By Mr. Knuff:

Mr. Knuff: With your Honors' permission, at the conclusion of the hearing on last June 29, 1948, the Government was directed to file proposed findings of fact, proposed con-
[fol. 330] clusions, and a suggested form of decree.

Those papers were filed, I think on the 27th of November of last year. Thereafter, the defendants were given 60 days to file objections to those proposals, and those objections were filed on the 4th of March of this year.

The court subsequently fixed May 13 and 14 as the date for hearing the oral argument, and that date was subsequently changed to today. I take it that the purpose of this hearing is to discuss the Government's proposed findings of fact, proposed conclusions of law, and proposed decree, together with the objections that have been filed to those proposals.

Chief Judge Stephens: Your statement should be corrected in one possible particular, Mr. Knuff. If you are intending to give the impression that the Government was required to file proposed findings of fact and conclusions of law, as distinguished from the decree, I think the record will show it was indicated to you that you might file such documents, if you saw fit, but the court had not committed itself as to whether or not findings of fact and conclusions of law as distinguished from the decree will be entered.

Mr. Knuff: I think that is right, your Honor, and that is what I intended to convey.

The plaintiff, if your Honors please, moved for summary judgment upon the whole case, and based its motion for that judgment upon (a) the pleadings and (b) all prior proceed-
[fol. 331] ings had in the case, including the testimony of witnesses, the admissions by counsel, and all exhibits.

So that there can be no doubt as to the scope of that motion, I would like to read the motion itself. The motion reads as follows:

> "Plaintiff, by its attorneys named below, upon the pleadings and all the proceedings heretofore had herein, including but not limited to all exhibits and testimony of witnesses, the admissions by counsel for the defendants, hereby respectfully moves this court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in its favor, or in the alternative.
>
> (2) If summary judgment is not rendered in the plaintiff's favor, upon the case, or for all the relief asked and a further trial is necessary, that the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted, and thereupon to make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just."

[fol. 332] The plaintiff in this case has always contended that the issue before this court is whether the defendants, being erstwhile competitors, by entering into common price-fixing patent license agreements for the purpose of organizing the industry and stabilizing prices, have violated Sections 1 and 2 of the Sherman Act.

Now, in stating the position of the Government as I do, it will be noted that we have not shifted our position. That is the position we took before this court throughout the trial of this case. It was the position we took on the motion to dismiss. It was the position that we took before the

Supreme Court and the same position that we took before the Supreme Court was adopted by the Supreme Court in its opinion. The Supreme Court said:

"The General Electric case affords no cloak for the course of conduct revealed in the voluminous record in this case. That case gives no support for a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized."

Chief Judge Stephens: Where is that in the opinion?

Mr. Knuff: That appears at page 400, if Your Honor [fol. 333] please, of the opinion.

Chief Judge Stephens: I have this slip opinion.

Mr. Knuff: I do not have a copy of the slip opinion.

Mr. Connelly: Thirty-four to thirty-five of the slip opinion.

Mr. Knuff: Page 400 of 333, Your Honor, is where it appears.

Chief Judge Stephens: Proceed, Mr. Knuff.

Mr. Knuff: "We apply the rule of reason of Standard Oil Co. v. U.S. 221 U.S. to efforts to monopolize through patents as well as in non-patent fields. Even in the absence of the specific abuses in this case, which fall within the traditional prohibitions of the Sherman Act, it would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert to restrain commerce in an entire industry under the patent licenses in order to organize the industry and stabilize prices."

So that there can be no doubt that on the motion for summary judgment we took the position that the entire case was to be disposed of, I would like briefly to review the contents of our brief that we filed with the court at that time. If the court will turn to page 3 of that brief, at the top of the page we said:

"In Point II of this memorandum we will consider the pleadings, the evidence, and the admissions and will dem-

[fol. 334] onstrate that there is no material issue of fact for this court to consider further; that the denials in the defendants' answers in reality amount to nothing more than denying the legal effects of facts rather than denying the facts themselves."

Judge Jackson: "Admitted facts."

Mr. Knuff: Legal effects of admitted facts.

Judge Jackson: You did not say "admitted facts" when you read it.

Mr. Knuff: I am sorry.

Then, under Point II of that memorandum we analyzed the complaints, paragraph by paragraph, in the light of, first, the answers of the defendants, and, second, the testimony of the witnesses and the exhibits offered in evidence.

We definitely told the court at that time that we relied upon the testimony introduced at the hearings. In this section—that is, Point II—we informed the court that we did not propose to draw our own inferences from the testimony and the exhibits. Instead, we stated that we would rely upon the inferences which the Supreme Court made.

We specifically said—and this appears at the bottom of page 3—

"In so far as it is necessary to refer to the facts gleaned from the testimony and exhibits, we shall adopt the summary of them as made by the Supreme Court in its opinion of March 8, 1948, on the appeal in this case."

[fol. 335] Therafter in Point II of that memorandum we classified the allegations of the complaint into certain designated classes and then referred this court to the particular passages in the Supreme Court's opinion dealing with each class.

For instance, on page 5 of the memorandum we referred to the early patent litigation in the industry and called this court's attention to pages 4 and 6 of the slip opinion of the Supreme Court.

Then on pages 5 and 6 of the memorandum we referred to the early license negotiations in the industry and called the court's attention to the activities of Mr. Blagden and Mr. Avery, as well as the activities of Mr. Griswold; and

on pages 5 and 6 we set out verbatim what the Supreme Court said.

We then referred to the period beginning with July, 1927, and ending with May, 1929—that is the period of further negotiations within the industry for patent licenses—and we again set out verbatim what the Supreme Court said about the evidence covering this period. That appears in our memorandum at pages 7 to 9.

Also in the memorandum we set out what took place in the industry beginning with the last day of the May, 1929, meeting, and ending with the execution of the so-called November, 1929, licenses.

Here again we set out not our version of what took place but the verbatim statement made by the Supreme Court. [fol. 336] That appears at pages 10 to 13 of the memorandum.

Following the entering into the industry-wide license agreements, we discussed in the memorandum what happened in the industry while the industry was operating under the license agreements.

For instance, at page 15 of the memorandum we pointed out that prices on board had been raised and stabilized and quoted what the Supreme Court said the evidence established concerning prices.

Likewise, on pages 15 and 16 of that memorandum we pointed out that board had been standardized, that No. 2 board had been eliminated, that open-edge board had been eliminated, and that seconds had been eliminated; and, again, we set out verbatim what the Supreme Court said concerning this standardization.

Judge Garrett: Just a moment. What did it say on that? You have it in the memorandum?

Mr. Knuff: I have it, sir, right in the memorandum.

Judge Garrett: I have forgotten.

Mr. Knuff: Beginning at the bottom of page 15 of the memorandum the Supreme Court's opinion summarized the evidence relating to the standardization of board in these words:

> "The Government introduced evidence tending to show that the price of first quality——"

Chief Judge Stephens: Just a moment, Mr. Knuff.

Judge Garrett: I do not seem to have the memorandum. [fol. 337] Very well, I have it now.

Mr. Knuff: Does Your Honor care to have me proceed and read what the Supreme Court said?

Judge Garrett: No, that is all right. I will read it. Go right ahead.

Mr. Knuff: On pages 17 and 18 of that memorandum——

Judge Garrett: I will ask you to go back for a moment there. The statement of the Supreme Court there is: "The Government introduced evidence tending to show that the price," and so on. Did they make a finding or draw an inference from that?

Mr. Knuff: To this extent, they did. Toward the end of the opinion the Supreme Court said:

> "The General Electric case affords no cloak for the course of conduct revealed in the voluminous record in this case. That case gives no support for a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed. . ."

So I would say that the Supreme Court did say that unpatented products were suppressed.

Chief Judge Stephens: What it said, to be a little more exact, was this: There was a prima facie evidence showing that suppression.

[fol. 338] Mr. Knuff: That is right. Now, there has not been introduced in this case any other evidence which was before the court. So, therefore, we take the position that that prima facie case now becomes conclusive.

Chief Judge Stephens: That raises a point which, although I am in a dissenting position in this case, I think I ought to ask you something about; and that is the rather startling position for the Government to take, one which comes as a surprise to me—you contend, do you, that the opinion of the Supreme Court is now binding conclusively on all statements which it made in respect of the prima facie case?

Mr. Knuff: I do, Your Honor. There is nothing before the court other than what was before the Supreme Court.

Chief Judge Stephens: I thought my colleagues entered their summary judgment upon the theory that there was nothing before the court but an issue of law under Rule 56.

Mr. Knuff: There was an issue of law before them, and that issue of law was that there was no genuine issue of fact as to any material matter.

Now, the material matters that were before the court concerned the raising of prices, the standardization of product, and the court, after taking into consideration what the Supreme Court said and after taking into consideration what the defendants proposed to prove by their proffer, the court said that even assuming everything that the defendants said they would prove would be proved, still, that would not [fol. 339] alter what the Supreme Court has said.

Judge Garrett: Insofar as the Supreme Court had spoken upon any material question of fact or of law.

Mr. Knuff: That is right.

Judge Garrett: At least, I think that is what we meant.

Mr. Knuff: I think that is the position Your Honors took.

Chief Judge Stephens: Do you take the position that even if you had not made a motion for summary judgment, that under the opinion of the Supreme Court the defendants would not have been entitled to any day in court on any question of fact?

Mr. Knuff: I will come to that later when I compare what would have happened if we had not made the motion for summary judgment with what actually has happened in this case. I would like to defer answering that question until I come to that portion of my argument.

Chief Judge Stephens: You contend, I assume, that your motion for summary judgment was meritorious.

Mr. Knuff: Yes. Oh, yes, indeed:

At pages 17 and 18 of the memorandum we pointed out that the industry attempted to fix and stabilize the prices of unpatented gypsum products and again quoted the identical language the Supreme Court used in summarizing this evidence.

At pages 18 and 19 we pointed out that the jobbers had been eliminated from the industry and were careful to quote

the language the Supreme Court used concerning the elimi-
[fol. 340] nation of jobbers.

We did not discuss in that memorandum the metallized board or the perforated lath licenses, nor did we discuss the attempts of the industry to fix the resale prices of manufacturing distributors.

As to these matters, however, we were very careful to point out that they were not waived, and that appears in our memorandum at pages 13 and 20.

Then, after discussing in this memorandum the things that I have just pointed out, we concluded this portion of our memorandum with the following statement, and this appears on page 22:

> "From what has heretofore been summarized it is apparent that the defendants have violated the Sherman Act just as charged in the complaint. Furthermore, it is apparent that on the basis of the complaint and answers alone there is no genuine issue of fact between the parties as to any material facts, for it is obvious, we submit, that the denials contained in the answers do not deny the facts; instead, the denials deny the legal effects of the facts. The Supreme Court decided that the legal effects were such as to violate the Sherman Act. Of course, when the uncontradicted evidence is considered (and parenthetically we add that it never can be contradicted) we have in this case facts which 'are overwhelming evidence of a plan of the licensor and the licensees to fix prices and regulate [fol. 341] operations in the gypsum board industry."

Judge Garrett: You say that even if the Supreme Court had made no finding on that—and I believe you practically concede that it did not make a finding——

Mr. Knuff: Finding on what, Your Honor?

Judge Garrett: The matter that you have just now been discussing.

Mr. Knuff: Oh, no, I say the Supreme Court did find that the legal effects of these facts were such as to constitute a violation of the Sherman Act. I said that. If I did not, I misspoke myself.

Judge Garrett: Perhaps I misunderstood you.

Mr. Knuff: Then in our memorandum of that same day we pointed out that the facts—and we used the words "the facts of this case"—show that the defendants had acted in concert to organize the industry and stabilize prices. In that memorandum we pointed out that the defendants are all the manufacturers of gypsum board in the territory east of the Rocky Mountains, that prior to May, 1929, competition at the price, quality, and service levels existed in the industry, that since that date competition at those levels has not existed.

We pointed out that in May, 1929, all of the defendants entered into patent license agreements and that these license agreements were substantially identical and all provided for price control.

[fol. 342] We pointed out that on the last day of the May meeting Mr. Avery offered to license the entire industry under the new bubble patent application.

We pointed out that subsequently the industry was licensed under the bubble application and that these licenses were referred to in the proceedings as the so-called November, 1929, licenses; that from the time these licenses were entered into, we pointed out that prices have been fixed down to July 8, 1941. Then, after pointing out all of those things, we said—and this appears at page 27 of the memorandum:

> "Thus far there can be no question that there is no genuine issue of fact in the case. It would be possible further to show that the defendants have also done many other things for the regulation of the gypsum industry which constitute unlawful restraints of trade. For example, there is no question that U. S. G. issued the bulletin of August 8, 1930, Government Exhibit No. 430, leveling off the price of board to jobbers with that applying in case of sales to dealers. There is also no question that jobbers, as the term is defined in the November, 1929, agreements, have been eliminated from the industry. Again there is no question but U. S. G. fixed the price of open-edge boards, No. 2 board, and seconds at the same amount as regular Sheetrock and that subsequently open-edge board, No. 2 board, and seconds have been eliminated from the market. Also,

there is no real question that the bulletin provisions [fol. 343] concerning rebates have operated to stabilize the price of plaster and other unpatented gypsum products sold in conjunction with board. There admittedly has been policing of the licensees by U. S. G. and its licensees through Board Survey. These, and many other practices stand in the record admitted, and, being done in concert, constitute traditional violations of the Sherman Act.

[fol. 344] "For the purposes of the present motion, however, it is not necessary to rely on these traditional violations in order to show that the plaintiff may have judgment."

And right there we insert a footnote reference, and that footnote reference reads:

"It will be understood, of course, that we do not abandon these traditional abuses."

We continued in the memorandum and said:

"As the Supreme Court said: 'Even in the absence of the specific abuses in this case, which fall within the traditional provisions of the Sherman Act, it would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices.'"

We quoted the slip opinion at page 35. To continue:

"In other words, it is enough to show that the defendants, being erstwhile competitors, have acted in concert to stabilize prices in an entire industry. This, we submit, has been shown beyond any doubt at all."

Then under the Point which we designate as "Conclusion" in the memorandum, here is what we ask the court to do—and this appears at page 42 of that memorandum:

[fol. 345] "For the reasons herein specified, it is respectfully submitted that the motion for summary

judgment should be granted. It is further respectfully requested that if the motion for summary judgment is not granted upon the whole case, this court shall make an order specifying the facts that appear without substantial controversy, and that the trial shall proceed only upon the facts specified as controverted."

At the oral argument in this case Mr. Steffen took the same position. That is, that this entire case was going to be disposed of on the motion. He began his oral argument by referring to the Supreme Court's opinion, and he said at that time that the Supreme Court has said in the opinion substantially what we heretofore had said when the case was before this court.

He called attention to what the Supreme Court said, and particularly he directed the court's attention to that portion of the Supreme Court's opinion which begins:

"That case affords no cloak for the course of conduct revealed by the voluminous record in this case."

And then, after referring to that portion of the Supreme Court's opinion, Mr. Steffen then said:

"I think for purposes of present argument, although we do not waive the point, that many of the abuses such as the court referred to in this portion of its opinion, such as controlling plaster prices, perhaps con- [fol. 346] trolling manufacturing distributors, fixing the size of truck loads, the amount of dunnage, eliminating jobbers, all of these abuses, if proven to have been done by concerted action, would normally constitute a violation of the Sherman Act, can for the purpose of this argument be laid to one side and we can look simply to whether or not the defendants combined under the patent licenses, being erstwhile competitors, covering an entire industry and fixed prices.

"Judge Garrett: The Supreme Court said that, did it?

"Mr. Steffen: That is as I read it, Your Honor.

"Judge Garrett: In other words, all these matters of dunnage and freights, and all of that, are not nec-

essary to the board decision that the court was making. Is that the way you interpret it?

"Mr. Steffen: I would say this: For purposes of a motion for summary judgment and for purposes of the Supreme Court's opinion, it isn't essential to show all of those violations. If you have shown price control alone, you have a case.

"Our purpose, therefore, is to clear this as nearly as we can to the essential point in issue—which we think is not in issue, and ask Your Honors for summary judgment on that basis.

"Then, when it comes to the matter of formulating [fol. 347] the degree, if you should give us summary judgment, then many of these matters will come up. I think you will find that most of them will be rather easily handled upon the decree."

Then, throughout the argument Mr. Steffen referred to the so-called——

Judge Garrett: Were you reading that from this pamphlet?

Mr. Knuff: I was reading that from my memorandum beginning at page 8, the second complete paragraph on that page.

Judge Garrett: Of this printed document?

Mr. Knuff: Yes, Your Honor, page 8.

Judge Garrett: Thank you.

Mr. Knuff: During the course of Mr. Steffen's further argument he indicated clearly enough that this entire case was before the court for disposition. He referred to the so-called traditional violations and related these traditional violations to the patent license agreements.

At transcript 7816, line 17, he dealt with the regimentation of the industry, the standardization of product, and elimination of jobbers.

Then at transcript 7820, line 16, he talked about regulating truck loads and delivery areas.

At transcript 7831, line 20, he talked about the policing activities of Board Survey.

On the following page, 7832, line 7, he talked about the [fol. 348] licensee meeting of October 17, 1932.

Then at transcript 7856, line 17, he again discussed the problem of the elimination of jobbers.

On the following page at line 12, he took up another question concerning an elimination of a class of dealers. That is, the elimination of Cardiff Gypsum Company.

At transcript 7863, line 1, he again referred to the elimination of jobbers.

On the following page, beginning with line 19, he again discussed the elimination of jobbers and the question of dunnage.

And, finally, at transcript page 7917, beginning with line 8, he discussed the elimination of jobbers, regulating dunnage, defining trucking areas, fixing the size of truck loads, and everything that has gone on in the industry.

In other words, Mr. Steffen discussed in his oral argument just what had been done in the industry after the so-called November, 1929, licenses were executed. Now, when you consider the composition of our brief, when you consider what Mr. Steffen argued before this court in his oral argument, I think that you must come to the conclusion that we expected this court to decide the whole case.

Chief Judge Stephens: Mr. Knuff, in the interest of saving time, what difference does it make what counsel on either side of the case expected of the court? The question before us is: What ought the court decide? Ought we grant a judgment on the whole case or ought we just [fol. 349] grant it on those undisputed issues which were the foundation, as I understood it, of my colleagues' summary judgment?

Mr. Knuff: Well, if you do not grant it upon the whole case, then I think that this court will have to comply with the provisions of Rule 56(d) and hold further hearings on this case.

Chief Judge Stephens: Well, I cannot understand why we had so much misunderstanding in the case. I had thought that this summary judgment proceeding arose as follows. It is all in the transcript, which I reviewed last night with some care.

After the mandate of the Supreme Court came down, counsel and the court met here, and the Government sug-

gested a so-called pre-trial or mid-trial hearing for a definition of what further issues remained in the case in view of the Supreme Court's opinion and for a statement or an order by the court as to what further evidence the defendants would be permitted to introduce.

The defendants objected to a pre-trial hearing or a mid-trial hearing and suggested that, on the contrary, if there were some dispute between the parties as to what further evidence might be introduced, in view of the Supreme Court opinion, that interrogatories be served upon them.

In the course of that colloquy it was indicated by Mr. Bromley, then counsel for the Gypsum Company, that the Government had been contemplating a motion for sum- [fol. 350] mary judgment, and that the Government admitted.

In the course of further conference and informal discussion between court and counsel, it developed that there was a good deal of confusion in the minds of all of us as to what the reach of the Supreme Court opinion really was, as to how far it went. It was indicated that it would be desirable for this court to express itself on that subject in order that counsel on both sides might be advised as to what further proceedings there would be.

We indicated, however, from the bench that there was nothing before us to rule upon. Finally, in the interest of what seemed fairness to all concerned, in order to get something before the court to rule upon, it was suggested that you make a motion for summary judgment, based upon the rule which provides that where there is no genuine issue as to any material fact, a summary judgment can be entered.

We, for the purpose suggested, said that we would entertain a summary judgment, a motion for summary judgment.

You, of course, were not compelled to make such a motion. But you did make it and you argued it, and with vigor, and the defendants resisted it. As I understood the whole argument in favor of the proposed summary judgment and the argument against it, it came down to the single proposition that the Government contended that the Supreme Court had ruled in its reversal of our decision that mere plurality [fol. 351] of patent license agreements, industry-wide, with

price fixing provisions adhered to by the parties was ipso facto illegal and, there being no dispute in the case—so it was contended—that there was such an industry-wide price fixing arrangement, that was the end of the matter and the case should, therefore, be terminated by a summary judgment limited to that one undisputed question.

Now, I understood that my colleagues reached the conclusion when they granted Government's motion for summary judgment, that the Supreme Court had so ruled; and I stated in a brief oral dissent that I thought it had not so ruled and, therefore, I did not agree that summary judgment could be entered.

So I thought that the action of the court, as far as the majority was concerned, in granting the motion for summary judgment was merely that a majority of the court—my two colleagues—thought that the Supreme Court had ruled that a mere plurality of patent licenses with price fixing provisions, industry-wide, adhered to by the parties was ipso facto illegal; and, therefore, the Government was entitled to a summary judgment because there was no dispute in respect to that question.

I thought that the Supreme Court had not so held, that if it had so held, it would have ordered a summary judgment entered itself and ended the case, and that because it had sent the case back for further proceeding, what it meant was that there must be something more than a mere plurality of patent licenses, there must be some action in concert [fol. 352] or some plan or some conspiratorial purpose to violate the Sherman Act, and that the defendants, as I read the Supreme Court's decision, were entitled to further proceedings in order to try and rebut the prima facie case of the Government, which the Supreme Court said had been made in respect of the charges of the Government, that there was a plan, a conspiracy, to violate the Sherman Act through the execution of sham licenses and with a general improper purpose to stabilize prices and eliminate competitors and standardize board, and the like.

I thought that was the posture the case had taken at the time we entered the summary judgment, and I think that is the view my colleagues had when they entered their summary judgment.

Now you are asking the court, apparently, to go far beyond that and to conclude that the Supreme Court meant that the case had been decided by it without reference to any evidence which the defendants might introduce and that, therefore, we must enter a decree as if the whole case had been completely tried.

I make this extended statement in order to clarify, if I can, what is before us, because it seems to me that you are now not arguing what form of decree should be entered, but you are re-arguing the question as to what was done by the court when it entered its summary judgment.

Mr. Knuff: I have to re-argue that because——

Judge Jackson: May I interrupt you a minute, Mr. Knuff?

Mr. Knuff: Certainly.

[fol. 353] Judge Jackson: Of course, you will recall that at the time the motion for summary judgment was made, Mr. Bromley, on behalf of all the defendants, made a proffer of proof as to what facts would be brought out on the stand if the case was continued for further evidence.

Mr. Knuff: That is right.

Judge Jackson: I, for one of the majority—and I assume my colleague, Judge Garrett, thought the same way about it—felt that if he proved everything he was going to prove, that it would make no difference.

Mr. Knuff: That is right.

Chief Judge Stephens: I neglected to say also the court required the defendants to make a proffer, which they did, at the same time you made your motion for summary judgment.

Mr. Knuff: I think the court requested the defendants to make a proffer, I don't know whether the court required them to do so.

Judge Jackson: It does not matter whether it was required or requested. It was done.

Chief Judge Stephens: As to the word "required", I accept your amendment. Thank you, Mr. Knuff. The court did not require anything of either side. The court suggested and requested these items. Counsel were not compelled to make a proffer. If they wished not to do so, they need not have done so. You were not compelled to make a motion for summary judgment.

Mr. Knuff: That is right.

[fol. 354] Chief Judge Stephens: The whole matter was a friendly and cooperative arrangement, as we understood it, in order to get a ruling from this court as to what the Supreme Court opinion meant.

Judge Garrett: I cannot see where there could be a misunderstanding about this matter, although evidently there was. In regard to what you read from the record on page 8 of your memorandum beginning with the quotation of the Supreme Court, certainly, Mr. Steffen indicated, and indicated clearly, that the matter of dunnage and freights and all of that was not necessary, that the Government had a case without that, and the majority of this court agreed with that and gave summary judgment based upon that theory.

Now, there is complaint here, a complaint was made that the parties should be permitted to introduce testimony. We did not feel that any testimony was necessary. Where the Supreme Court had specifically found facts and applied law to the facts, certainly, there was no necessity for it. We cannot grant a new trial of a case that the Supreme Court has decided.

Now, apparently you seek to bring in here and have embodied in this decree questions which at that very time it was stated were unnecessary to the summary jugment. I do not understand it, Mr. Knuff. It makes it hard. It makes it intensely hard on a court to have to be called on—you are entitled to a decree. If you draw a decree in conformity with the decision of the Supreme Court of the United States, [fol. 355] you are entitled to it, of course, and this court will cause it to be entered, because that becomes part of the duty of this court.

But to undertake to make us reconsider here a lot of questions that the Supreme Court did not decide, I just do not understand that. It worries me.

Mr. Knuff: May I reply to what Your Honor has said?

Judge Garrett: Certainly.

Mr. Knuff: When Mr. Steffen answered your question, you must take into consideration that Mr. Steffen answered that in the light of saying that he was not waiving anything in this case.

Judge Garrett: Oh, certainly.

Mr. Knuff: You must take into consideration the context of our brief. We ask the court not to take one isolated statement by which the court now feels Mr. Steffen waived something. We ask the court not to take that one isolated statement and disregard everything else that Mr. Steffen said. Read that statement of Mr. Steffen in context with the brief. Read it in context with what he said in the subsequent portion of his argument. Do not take one statement that Mr. Steffen said—and I do not think even that statement goes as far as Judge Garrett indicates—but do not take one isolated statement and say the court is now going to decide this case upon that statement. Take the statement in conjunction with everything that we said.

[fol. 356] Judge Garrett. Now, let's see. I read again Mr. Steffen's statement made at that time. I would say this:

For the purposes of a motion for summary judgment and for the purposes of the Supreme Court's opinion it is not essential to show all of those violations, referring back to dunnage and freights, and so on—"if you have shown price control alone, you have a case."

Now, we thought Mr. Steffen correctly stated the law and so proceeded.

Chief Judge Stephens: I may add this before you reply, Mr. Knuff. What I thought Mr. Steffen meant and what I thought we had a reasonable right to conclude from his argument was that if we entered a summary judgment or if the majority, as it has now, had entered the summary judgment on the theory that a mere plurality of price fixing licenses, adhered to by the parties was without more irrespective of any plan or conspiratorial intent to violate the Sherman Act illegal; if the court thought that was what the Supreme Court's opinion meant and entered a summary judgment upon that theory, I thought that was enough to satisfy the Government as far as summary judgment was concerned; but that if it should turn out upon a review of the summary judgment when entered that the Supreme Court had not held that a mere plurality of patent licenses with price fixing provisions without more was illegal, then, of course, the Government would not waive its right in a further trial of the case to have a disposition of it in the

[fol. 357] manner in which it contends it should be disposed on the other issues of fact.

Mr. Knuff: Look what Mr. Steffen said at that time:

> "For the purposes of "a"—not "this"—"for the purposes of a summary judgment and for the purposes of the Supreme Court's opinion, it isn't essential."

We could have moved on that basis and moved on that basis alone, but we did not. Our motion says that we are asking for summary judgment upon the whole case. We could have thrown everything out the window that the Supreme Court had given us on the opinion and we could have moved for summary judgment on the basis of a plurality of licenses constituted a violation of the Sherman Act. We could have done that. We did not do it. We moved for summary judgment upon the whole case.

Chief Judge Stephens: Well, it seems to me that we are wasting time. Of course, I am only the moderator here. I am in a dissenting position. You are entitled to make any argument within a reasonable length of time that you wish to make. You are not restricted in that respect.

The question before us is not what you moved for, the question is what you are entitled to. That is what the majority has to decide, the kind of decree. You have got your motion for summary judgment granted. The question before us now or before the majority now is whether or not, first, findings of fact and conclusions of law should be entered, and, second, what should be the terms of a [fol. 358] decree?

Mr. Knuff: Yes.

Chief Judge Stephens: It may enlighten us, of course, to know what you contended and, of course, if we had a complete misunderstanding of all the Government was asking for, we ought to know it, and you are free to attempt to correct our view in that respect; but please bear in mind in view of the very large number of counsel that have to argue here that what is really before us is whether or not we should enter findings of fact and conclusions of law and what form the decree should take.

Mr. Knuff: Well, I think that is all that is before the court, but in order to take up the form of what the findings of facts should be, it is necessary first to determine what the scope of our motion was.

Judge Jackson: Why do you not assume that the court has its own understanding of what that scope is? We have had plenty of oral argument and we have had plenty of briefing on that, Mr. Knuff. Assume that we know.

Mr. Knuff: All right, sir. Mr. Steffen asks if we could have a recess at this time.

Chief Judge Stephens: We will take a recess for fifteen minutes.

[fol. 359] Chief Judge Stephens: Proceed.

Mr. Knuff: May it please the court, I shall pass immediately to the proposition that the court should make findings of fact. Although Rule 52(a) of the Federal Rules of Civil Procedure says that on motions for summary judgment, findings of fact are not necessary, nevertheless in cases like this one, courts have recognized that the findings of fact are desirable.

So, in our memorandum we quote from the Prudential Insurance Company case, and we also quote from the Saginaw Broadcasting case which was decided here in the District.

There is a later opinion of the Court of Appeals which the defendants cite in their brief, the case of Berman v. Lenkin, reported at 159 Fed. 2nd, at 827. That case also was one in which a motion for summary judgment was interposed and Judge Groner, in deciding that case, said this:

> "We think it is always desirable that the facts should be found to aid us."

There are no reported cases in the books where the facts exactly parallel the situation which we have in this case, but the Associated Press case is sufficiently similar to the facts in this case that this court can conclude that that case is of persuasive enough authority to warrant this court in adopting the procedure that was used in that case.

The Associated Press case, like this case, was a civil antitrust action brought in the Southern District of New York——

[fol. 360] Judge Jackson: That is cited in your brief?
Mr. Knuff: That is cited in my brief.
(continuing)—in which the Government charged the defendants therein with violating sections 1 and 2 of the Sherman Act. That case, like this one, was tried before a statutory three-judge court.

After the answers were filed, the report of the case indicates that much testimony was taken in the form of interrogatories, admissions under Rule 36, examination before trial, and affidavits.

There, as in this case, the Government moved for summary judgment and that motion was granted.

The opinion of the case was rendered on October 6th, 1943, and in the opinion the court says this:

> "The plaintiff will submit proposed findings and a proposed judgment and will serve the same upon the defendants, who will submit any substitute they may wish within thirty days thereafter."

Thereafter, on January 13, 1944, the District Court made findings of fact and conclusions of law, and the place where they are reported is indicated in our memorandum.

We take the position that this case has been tried upon the facts within the meaning of Rule 52(a). Rule 52(a) says that in all cases tried upon the facts, the court shall find the facts specially and state its conclusions of law. The circumstances under which this case came before this [fol. 361] court for decision are such that this court can say that the case has been tried upon the facts.

> "The instant case," said the opinion of the District Court, "came on for trial on November the 15th, 1943, and continued thereafter for some sixty-six trial days."

The testimony of some twenty-eight witnesses was heard before the court. Six hundred and forty-one exhibits were received in evidence. At the conclusion of the Government's case, the defendant made a motion to dismiss that was orally argued and the motion was granted. Thereafter, the Government perfected an appeal to the Supreme Court and the Supreme Court on March 8, 1947, reversed this court. Thereafter, on June 7th, as Judge Stephens indicated ear-

lier, a conference was held and Judge Stephens stated what took place at that conference.

Now, it is our position that the posture that this case has assumed is such that it requires findings of fact to be made.

If you will stop one moment to consider what would have happened if no motion for summary judgment had been made, and then consider what has happened because a motion for summary judgment has been made, I think that you will find that there is no material difference between the two procedures.

Judge Garrett: May I ask you a question?

Mr. Knuff: Certainly, sir.

Judge Garrett: Findings of fact should be made upon questions upon which the Supreme Court did not make find-
[fol. 362] ings of fact, is that right?

Mr. Knuff: Yes, Your Honor, under the posture of this case.

Judge Garrett: Then, you would not expect this court to find facts not passed upon and not found by the Supreme Court and which were challenged in the proffers of proof to be passed upon, without opening this whole question again for that proof?

Mr. Knuff: If Your Honor pleases, the Supreme Court could not have made any findings of fact when this case was before it. The Supreme Court did not know what was going to happen after the reversal. The Supreme Court did not know whether or not the defendants were going to deny the execution of the patent license agreements. The Supreme Court could not know what was going to happen when it came time for the defendants to put in their case. Therefore, the Supreme Court could not make any findings of facts that would be conclusive. All that the Supreme Court could say was that "On the facts before us, the record is clear that the Sherman Act has been violated."

It may be, as far as the Supreme Court knew, that these defendants were going to deny the issuance of the licenses, of the bulletins, that they were going to deny the execution of the license agreements——

Chief Judge Stephens: How could that possibly be, when they had admitted that in their pleadings?

[fol. 363] Mr. Knuff: The Supreme Court couldn't tell what the defendants would do.

Chief Judge Stephens: The defendants are bound by their pleadings.

Mr. Knuff: That is right.

Chief Judge Stephens: And in the pleadings they admitted the execution of the patent licenses and sending out of the bulletins.

Mr. Knuff: That is right; but the Supreme Court could not tell what position the defendants would take subsequently in this case. They could have denied even that there were any patents, so the Supreme Court could not make any findings of fact.

Chief Judge Stephens: They could not do that without stultifying their own pleadings.

Mr. Knuff: I grant you that.

Chief Judge Stephens: It is not understandable that the defendants file, before a federal court, a solemn sworn answer, admitting the execution of the patent license agreements, and sending out the bulletins, and then turn around, in their own case, and deny it.

Mr. Knuff: The Supreme Court couldn't tell what they were going to do.

Chief Judge Stephens: They are bound by their pleadings just as much as the Goverment would be.

[fol. 364] Mr. Knuff: That is true, but the Supreme Court could not tell what the defendants were going to do——

Chief Judge Stephens: Proceed.

Judge Jackson: They could not tell what evidence the defendants might have that they wanted to submit.

Mr. Knuff: That is right.

I was talking about what would have happened if we had not made any motion, and what actually has happened. I was going to compare what would have happened if no motion had been made. This case would have been set down for the taking of defense testimony.

It can be assumed that when the witness was called to testify, that the government then would have asked the attorney calling the witness for an offer of proof that he proposed to adduce by the witness on the stand. It can be further assumed that the attorney would have stated that

he proposed to prove, by the witness on the stand, one or more of the matters which were filed as a part of the proffer. It can be further assumed that the government would object to that offer of proof.

Now, in view of the action taken by this court on June 29, it can be assumed that that objection made by the Government would be sustained.

Now, this piecemeal calling of witnesses, requests for an offer, the offer, the objections, the sustaining of the objec- [fol. 365] tions, would go on and on until the defendants had exhausted the entire witness list that they intended to call to establish the total of their proffers.

When their witness list was exhausted, they necessarily would have been required to rest their case; and yet, there would not have been before this court any defense testimony.

In such a situation, I submit no one would argue that the case has not been tried upon the facts.

Now, the only difference between what would have been done and what actually has been done is this: We, by our motion for summary judgment, have brought before this court, promptly and collectively, everything that the defendants would have brought before this court by their piecemeal calling of witnesses.

If, on the one hand, it is conceded that the calling of witnesses and the offers and the objections would constitute a trial upon the facts, then certainly under this more efficient method of disposing of those legal questions, a holding that that does not constitute a trial upon the facts seems to me to involve a very unrealistic appreciation of what is meant by the phrase "tried upon the facts."

But the question whether or not findings of fact now should be made cannot be determined by the Rules of Civil Procedure alone.

Judge Garrett: May I interrupt you a moment?

Mr. Knuff: Certainly, sir.

Judge Garrett: The Supreme Court made findings of [fol. 366] fact. It reversed this court on findings of fact. Why can you not take the decision of the Supreme Court of the United States and draw a decree?

Now, you want to come back here and have us try it, and try it again. Here is the case. Here is the decision. Why

cannot the government draw a decree in conformity with this opinion of the Supreme Court of the United States? They have passed on the facts. All that they regarded as material to be passed upon, has been passed upon.

Why is it that we have to just worry and worry our lives out about this matter?

Here, the Supreme Court has spoken. That is the law, so far as courts are concerned, and so far as citizens are concerned.

Why can you not just take that opinion and draw a decree from it? It was not sent back to us to draw a decree. It was reversed and remanded for consideration in conformity with this opinion. I think that is the way it is expressed.

Mr. Knuff: That is right.

Judge Garrett: Now, why do you not take that opinion and draw a decree here and let us get rid of this? Why do you persist in bringing into this matters which we did not decide and which the Supreme Court apparently did not decide? You had better look at the decree carefully and see, I mean.

You are entitled to draw the inferences that the Supreme [fol. 367] Court drew from certain facts, I think, in formulating your decree; but, it is not now an issue here between the Government and the defendant. It is an issue, I guess, between what the Supreme Court decided and what we decided. I have read, of course, not all of these briefs, I have not had the time, and perhaps I am anticipating counsel for defense somewhat, but why can you not take that opinion, why can you not get together and take that opinion and draw a decree in conformity with us and let us decide this case and get rid of it?

Mr. Knuff: May I answer Your Honor?

In the first place the Supreme Court did not make any findings of facts. This case may go back——

Judge Garrett. They reversed. Of course you know what I mean. They reversed this court upon the facts, or at least upon inferences drawn from the facts.

I venture to say, here, now, that I do not believe a more careful opinion in a case of this magnitude was ever pre-

pared than that prepared by the presiding judge of this three judge court. Every minutia was gone into.

The Supreme Court reversed upon certain phases of that opinion. The reversal was sufficient to give the Government a decree.

Judge Jackson and I thought that, within the limits of the decision of the Supreme Court, that decree should of course be granted and that nothing that was given us in the [fol. 368] proffer of proof would change the attitude of the Supreme Court within the scope of those matters upon which it had specifically passed.

Now, that was the summary judgment. I am sorry not to be able to understand, but are you seeking to reopen that case?

Mr. Knuff: No, Your Honor. We are seeking to have this court comply with what we conceive to be the mandate of the Supreme Court. The Supreme Court did not make any findings of fact. The Supreme Court sent this case back to this court to make findings of fact, and here is what the Supreme Court said about that,——

Judge Garrett: Then, I guess we had better change our view, I mean, I had better change my view and let the findings of fact be made.

Judge Stephens evidently must have been right, if that is the interpretation, it was sent back here to this court to make findings of fact. Then, it was evidently necessary to have evidence to make findings of fact.

Mr. Knuff: May I continue?

Judge Jackson: Suppose you put forth your contentions and then we will have Mr. Connelly or whoever will speak on behalf of the defendants, put forth their contentions.

Mr. Knuff: May I continue with what the Supreme Court said in connection with sending the matter back?

On page 399 of the Supreme Court opinion, this appears at page 21 of the government memorandum, this is [fol. 369] what the Supreme Court said:

> "The trial court made many other findings to which the Government objected——"
>
> Chief Judge Stephens: Is this on the slip sheet?
>
> Mr. Connelly: Thirty-three.

Chief Judge Stephens: Thirty-three?

Mr. Knuff: I will start over again:

"The trial court made many other findings to which the government objected and yet to determine here whether each is erroneous is unnecessary. Perhaps looked at in isolation some of the government's charges are not proved with the fullness that would justify our reversal of the findings of the District Court on the point. It may be in the light of this opinion the District Court will conclude that many such findings are no longer significant in reaching its decision."

Now, note:

"As to others a different result will be required. Enough has been said as to the findings and the evidence, we think, to enable the District Court to pass upon the facts that may come before it on further proceedings in accord with our present ruling."

Now, since the Supreme Court has indicated that -his court is to pass upon the facts in further proceedings, and a motion for summary judgment is a further proceeding, I [fol. 370] do not know of any way that this court can comply with that mandate other than by making findings of fact.

Chief Judge Stephens: I thought, Mr. Knuff, the further proceedings which were contemplated by the Supreme Court, was an opportunity to the defendant to put in proof.

In that portion of the opinion from which you read earlier this morning, the Supreme Court said:

"The General Electric case affords no cloak for the course of conduct revealed in the voluminous record in this case. That case gives no support for a patentee acting in concert with all members of an industry to issue substantially identical licenses, etcetera."

And then, it repeats:

"In the absence of specific abuses in this case which fall within the traditional prohibitions of the Sherman Act, it would be sufficient to show that the defendants, constituting all former competitors in an entire industry, had acted in concert in restraining commerce in an entire industry under patent licenses, in order to organize the industry and stabilize prices."

I thought when the Supreme Court held that a prima facie case of action in concert to restrain commerce in an entire industry under patent licenses, in order to organize the industry and stabilize prices had been made, it meant only to reverse our conclusions that it had not been made [fol. 371] and that in sending the case back to us for further proceedings, it meant to give the defendants an opportunity for a day in court to try and convince the court that they had not acted in concert, and had not executed the licenses other than to organize the industry and stabilize prices.

It seems to me that it really is very difficult to reach the conclusion that the Supreme Court has ordered us to make findings of fact without any further evidence in this case. Surely the due process clause gives the defendant the right to try and meet the Government's prima facie case, does it not?

Mr. Knuff: That's right, and they had a day in court. They made their proffer as to what they intended to prove, and this court, said, at least a majority said, that if everything was testified to which the defendants specify in their proffer, that that would not bring about any difference in the Supreme Court's opinion. They have had their day in court. They have made their proffer. This court has passed upon it. This court said that the proffer does not present any issue.

Judge Garrett: Quite so. That expression was limited, though, to the proffer of proof that came within what we conceived to be the findings of the Supreme Court of the United States; and, the findings with regard to the other matters, we regarded, Judge Jackson and myself at least did, and I don't think there was any great disagreement between Judge Stephens and I, we understand each other's [fol. 372] opinions very well—there was no disagreement about that, but here, you are coming here and asking us to make findings of fact upon which the Supreme Court never passed. You are asking us to construe what the General Electric case means.

Mr. Knuff: No, Your Honor.

Judge Garrett: Well, I don't know whether you are or not, but that is the way it seems to me.

Mr. Knuff: We are only asking this court——

Judge Jackson: You are asking us to make findings of fact according to your interpretation of the Supreme Court decision, and the light of the subsequent proceedings that were had.

Mr. Knuff: That is right.

Judge Jackson: You are entitled to that thought, whether we agree with it or not.

Mr. Knuff: That is a different question.

I will now come to the findings of fact which we ask this court to make:

The defendants have objected to each of the findings that we have submitted, except findings 8, 10, 18, 19, 35, 39, 46, and 51. I do not intend to answer each objection that these defendants have made. The objections take up fifty pages in their memorandum.

Instead, I am going to do what the defendants have done. I am going to classify their objections, and I will answer [fol. 373] and point out that the classifications do not raise any legal questions that have any merit to them. To this end, I will adopt the same classifications that they make on pages 9 to 11 of their objections.

The first classification is that the findings are not supported by evidence, that many of the findings are not ultimate findings.

The first objection, that the findings are not supported by the evidence, of course covers every phase of the case and I will pass that for the moment.

Their second, that many of the findings are not ultimate findings implies at least that it is the duty of this court to find only the ultimate facts.

Now, whatever the rule may be in other circuits as to the duty of the court to find ultimate facts or to find both evidentiary facts and the ultimate facts, the rule in this circuit certainly is clear. The rule in this circuit is, as Judge Stephens pointed out in the Saginaw Broadcasting case, the rule in this circuit is that the court is required to find both evidentiary facts and the ultimate facts.

Their second classification of objections is that the findings are wholly outside of the court's determination of the issues decided on June 29th, 1918.

Now, I have discussed that and I am not going to go into it again.

[fol. 374] The third classification——

Chief Judge Stephens: You have confused me. By June 29th, you mean the date of our decision when we dismissed the government's complaint?

Mr. Knuff: That is right.

Judge Jackson: That is not 1918, 1948 you mean.

Mr. Knuff: What?

Judge Jackson: You said 1918.

Mr. Knuff: I meant 1948. I am going back thirty years, and I certainly did not mean to go back that far.

[fol. 375] Judge Jackson: All right.

Mr. Knuff: The third classification that the defendants make to the proposed findings is that they are inconsistent with and different from the former findings made by this court. Of course that is true. The Supreme Court passed upon many of the findings, and the Supreme Court said that those findings were wrong.

Now, this court on June 8, 1948, entered an order vacating the previous order of dismissal, and, it is our position that with that order vacating the previous order of dismissal, this Court set aside the former findings and conclusions. The defendants also say, under this classification, that this court is not required to find the facts differently than it found before.

Well, our answer to that is that the Supreme Court said you were. The Supreme Court said:

"As to others, a different result will be required."

And the Supreme Court then was talking about findings.

The fourth classification is, that since there are facts which are in dispute, it would be improper for this court to make any findings.

Well now, the use of their expression "facts which are in dispute" requires some examination to determine the sense in which they use that expression. It has never been our understanding that the basic facts in this case were in dispute. What was in dispute in this case is the inferences [fol. 376] which were to be drawn from those basic facts, the basic facts themselves being admitted.

Now, this same understanding that the Government had is the identical understanding of the judges who heard this case.

In the opinion in this case, reported in 67 Fed. Sup., Judge Stephens said:

> "The conflicting contentions of the parties on the issue of fact in the case are not as to what the evidence is, or as to what are the basic facts shown by evidence. The dispute is to the inferences to be drawn from the basic facts and therefore as to what the ultimate facts are."

Chief Judge Stephens: If I may, I find it necessary to defend my own opinion, Mr. Knuff, although the Supreme Court didn't leave much of it to defend.

I made that statement for this court in the opinion, in reference only to the evidence that we had then heard, not with respect to evidence which might be introduced by the defendant.

Mr. Knuff: That is right, that is right.

Since it is evident that the defendants are using facts in dispute as the equivalent of inferences in dispute, the answer to their contention should be fairly obvious. The correct rule is that where inferences alone are in dispute, the facts not being controverted, it is for the court to draw the inferences.

[fol. 377] Their fourth classification, rather, their fifth classification is that many of the findings are based on declarations and hence cannot be used as a basis for making findings. Well, the answer to that is that the Supreme Court said that the declarations are binding upon the others. That Court said that at page 388 of their opinion:

> "We are unable to accept, however, the ruling of the court that the declarations of each defendant were admissible only against the defendant making the declaration. A consideration of that point really involves the heart of the case, since the treatment of the declarations may vitally affect its outcome. Some may have doubts as to whether the agreements and bulletins alone are sufficient to establish conspiracy; but

the admissions of the separate declarations against all, greatly strengthens the Government's position. We think that industry-wise license agreements entered into, with knowledge on the part of the licensor and licensee, of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins, were sufficient to establish the prima facie case of conspiracy. Each licensee, as is shown by the uncontradicted references, through their meetings and discussions that were preliminary to the execution of the licenses, could not have failed to be aware of the intention of United States Gypsum [fol. 378] and the other licensees to make arrangement for licenses industry-wide.

"The license agreements themselves, on their face, show this purpose. The licensor was to fix the minimum prices binding, both on itself and its licensees. The royalty was to be measured by a percentage of the value of all the gypsum products, patented or unpatented. The license could not be transferred without the licensor's consent, and the licensee opened its books of account to the licensor. The licensee was protected again competition with more favorable licenses and there was a cancelation clause for failure to live up to the agreement.

"Furthermore, the bulletins gave directions to the industry as to its prices and methods of operation in unmistakable terms. The District Court did not accept the foregoing facts as definite evidence of a conspiracy. To us, these facts are proof of a conspiracy. Certainly they are overwhelming evidence of a plan of the licensor and licensees to fix prices and regulate operations in the gypsum board industry."

Now, as I said previously, since there has not been introduced any other testimony in this case, other than what was before the Supreme Court, the prime facie nature of the declarations now becomes conclusive in character and these are binding upon the defendants and the court can make findings based upon them.

We have filed 165 proposed findings of fact. We feel

[fol. 379] that all of these findings are proper, and are supported by substantial evidence.

Findings 1 to 15 relate to the defendant and to the general nature of the gypsum industry. In these findings we set forth the names of the corporate defendants and individual defendants. We set forth the relative positions that each occupies in the industry, the interstate character and dollar volume of the trade involved; and also, a short statement of the methods used in the manufacture of gypsum board.

Findings 16 to 25 introduce the conspiracy in this case. These findings trace the development of the conspiracy during the years 1925 and 1926. Here, the facts relating to the early patent litigation are set forth and also the facts relating to the early license negotiations between Mr. Blagden and Mr. Avery, and the activities of Griswold.

Findings 26 to 28 carry the same conspiracy over through the year 1927. During this period, as the findings indicate, Blagden and Griswold continued their activities to induce non-licensee manufacturers to become licensees. During this period Griswold was in contact with Avery, and he advised Mr. Avery of the progress that was being made.

Findings 29 to 35 develop the same conspiracy during 1928. As these findings indicate, Certain-teed acquired the assets of Beaver. Certain-teed refused to take over the license agreement which Beaver had entered into in 1926 with U.S.G., and U.S.G. filed suit to compel Certain-teed to [fol. 380] assume this license.

These findings also point out that Holland, a new-comer to the industry, became active in promoting industry-wide license agreements.

These findings also develop the facts relating to further activities on the part of Griswold, Blagden and Mr. Avery.

Findings 36 to 53 trace the development of the same conspiracy during 1929.

Early in 1929, there was renewed activity for industry-wide license agreements which culminated in the meeting at the Palmer House, in Chicago, on May 21 through May 23, 1929.

These findings also trace the activities of Holland during this period, as well as the activities of Baker and Mr. Kling.

What happened at the meeting at the Palmer House in May, 1929, is developed by these findings. Following the signing of the licenses in May, 1929, the industry met, during the summer and fall of that year, and traded out the terms of the November, 1929 licenses. These facts are stated in this series of findings.

Now note, please, findings 1 to 53 identify the defendants; describe the industry and trace the development of the industry,—trace the development of the conspiracy from its inception in the middle 1920's to, and including the execution of the November, 1929, licenses.

In formulating these findings, we have followed very, [fol. 381] very closely the language used by the Supreme Court, tracing the conspiracy down to 1929.

In our memorandum, we break down the findings, as I have just broken them down. Then, we set forth what the Supreme Court said about them.

I don't think that I can add anything more to what is already in the memorandum on this point, and I am not going to try. We have set forth the identical language used by the Supreme Court, and I think that this court, if it will compare the findings, 1 to 53, with the language used by the Supreme Court, this court will find that we have followed, very, very closely, just what the Supreme Court said.

Findings 54 to 65 relate to the Newark and Celotex board licenses; the metallized board licenses, and the perforated lath licenses. Other than refering to the fact that U.S.G. offered the industry licenses on metallized board and perforated lath, the Supreme Court did not discuss those topics in its opinion.

In our memorandum in support of the proposed findings, we set forth the facts relating to these licenses. These facts, as we set them forth in our memorandum, are not, and cannot be denied. We think that we have drawn the correct inferences from those facts, and in our memorandum we set out everything that we think is material, surrounding the execution of the metallized board and the perforated lath licenses, and we will allow our memoran- [fol. 382] dum to speak for us.

Now, findings 66 to 161 set forth what was done in the industry after the licenses were entered into.

These findings detail the operation of the conspiracy, and how the license agreements were used to organize the industry and stabilize prices.

I want to break those findings down just a little bit further.

Findings 66 to 72 relate to the raising of prices on first quality board. The Supreme Court said that such prices were raised. What the Supreme Court said is set forth on page 51 of our memorandum.

Findings 73 to 86 relate to the standardization of product, the elimination of seconds, the elimination of Number Two board, and the elimination of open-edge board. The Supreme Court held that the product was standardized, and what the Supreme Court said in that connection is set forth on pages 51 to 54 of our memorandum.

Findings 87 to 91 relate to the standardization of board sizes, and standardization of packaging board for shipment. The Supreme Court held that there was such a standardization. That is set forth in our memorandum on page 52.

Findings 92 to 96 relate to the stabilization of prices of unpatented gypsum products, or rather, to the attempt to stabilize prices on unpatented gypsum products. The [fol. 383] Supreme Court held that the defendants did attempt to stabilize the price of unpatented gypsum products and that is set forth in our memorandum at page 55 to 56.

Findings 97 to 105 relate to the elimination of jobbers. The Supreme Court held that jobbers were eliminated, and what the Supreme Court said is set forth on page 56 of our memorandum.

Findings 106 to 119, I am going to pass by those for a moment.

Findings 120 to 161 relate to the regimentation within the industry. Included in these findings are first, those relating to trucking regulations. The facts are set forth in our memorandum at pages 74 to 89. The findings related to them are Findings 120 to 129.

The second class of findings relating to regimentation

within the industry are those relating to Board Survey. Those are Findings 130 to 133.

The third class of findings relating to regimentation of industry are those relating to licensee meetings. Those are Findings 134 to 155.

The fourth class of findings relating to regimentation of the industry, are those relating to the inspection of the licensees' books, and those are set forth in Findings 156 to 161.

The Supreme Court has said that the industry was completely regimented. What the Supreme Court said on [fol. 384] these topics, that is, Findings 120 to 161, are set forth in our memorandum at pages 74 to 89.

Now, turning back to the findings that I have just passed over, that is, Findings 106 to 119, I want to take up Findings 106 to 114.

These findings relate to the resale prices of manufacturing distributors. The Supreme Court did not pass upon this branch of the case, although the Court did refer to the fact that this question was in the case. The Supreme Court said, "As to other findings, a different result will be required."

We have set forth in our memorandum what happened in the industry, relating to the attempt to fix resale prices, and I am going to allow what we say in our memorandum to speak for us. That is set forth at pages 58 to 71.

Now, that brings me to Findings 115 to 119, and these findings relate to the exclusion of the Cardiff Gypsum Company from the industry.

I want to discuss, briefly, the exclusion of this manufacturer, or this distributor, or this company——

Judge Garrett: Did the Supreme Court make any reference to that?

Mr. Knuff: No, sir, Your Honor, they did not.

Judge Jackson: Is that the producer on the Pacific Coast?

Mr. Knuff: No, sir. The Cardiff Gypsum Company has a plant located at Fort Dodge, Iowa.

[fol. 385] Judge Jackson: Go ahead, I was just mistaken. I was thinking of something else that occurred during the trial.

Mr. Knuff: Cardiff Gypsum Company has a plant located at Fort Dodge, Iowa, and its products are sold rather extensively throughout the Middle West. It manufactures plaster and other related gypsum products, but it never manufactured gypsum board.

Early in 1933, Mr. Sensibar contacted Mr. Holland, of Universal, and he asked Mr. Holland to sell Cardiff some board at a discount. According to Mr. Sensibar, Holland told him that Cardiff had the reputation, as a price cutter on plaster, and he doubted, under those circumstances, whether U.S.G. would give their consent to sell at a discount.

While Sensibar was negotiating with Holland to purchase board, he also saw Mr. Henning of U.S.G., and he told Mr. Henning that he was trying to buy board from Universal, and he hoped that U.S.G. would give its consent to purchase that board.

Henning, according to Sensibar, told him exactly the same thing that Holland told him, that is, that there was an impression in the industry that Cardiff was a price-cutter and that this was not a very propitious time in which to attempt to buy board.

At any rate, U.S.G. did not give their consent to Universal, and Cardiff was not able to buy board from Universal.

In the fall of that year, Sensibar went to Port Clinton, and took up with Arthur Black, the sales manager of American Gypsum Company, whether or not American [fol. 386] would sell board to Cardiff at a discount.

Judge Garrett: Of course, I know that is part of the record, I believe it was admitted upon the theory of finding out something about the plaster price.

Mr. Knuff: That is right.

Judge Garrett: That is part of the record, but is that referred to at all in the decision of the Supreme Court?

Mr. Knuff: No, Your Honor, it is not.

Judge Garrett: You are just arguing it there, in support of the general allegations of the Supreme Court, is that it?

Mr. Knuff: That is right.

Judge Garrett: All right.

Mr. Knuff: That is right, sir, and I say that the findings should be made on this branch of the case for the addi-

tional reason that in their proffer of proof, the defendants do not undertake to say, do not undertake to deny the testimony of Mr. Sensibar; so, as far as what is before the court is concerned now, you have before the court, on this branch of the case, the uncontradicted testimony of an unimpeached witness.

They do not offer to prove that the facts are differently than were testified to by Mr. Sensibar.

Judge Garrett: It was admitted, however, for a particular purpose.

Mr. Knuff: That is right.

Judge Garrett: And limited to that purpose.

Mr. Knuff: And we are not asking the court to change [fol. 387] its ruling on that. We are going to accept that ruling. We are not asking the court to change its ruling. It was admitted for the purpose of showing plaster prices were fixed.

Now, what the court said in that connection is set forth on page 57 of the defendants' memorandum. On page 57 of their memorandum they set forth exactly what was said at that time.

I think it is page 57, I could be wrong. No, it is page 57. Here is what is said, there:

> "All of us are agreed, all the judges, that they, that they are not admissible under paragraph 45(e). Judge Jackson and myself are of the view that they are admissible under paragraph 45(c) where it is charged that the defendants concertedly raised, maintained and stabilized the general level of prices for plaster and miscellaneous gypsum products."

Then, the court went on to say the theory upon which they were admitting this class of evidence.

So, as I say, we are not asking the court to change its ruling. We are going to accept that ruling, but we are calling the attention of the court to the fact that this evidence is not denied. They don't make any offer to show differently.

Judge Garrett: That was not included in the proffer of proof?

Mr. Knuff: No, sir, Your Honor. There is nothing in [fol. 388] their proffer of proof about it.

Judge Garrett: Was there anything about this in the pleadings?

Mr. Knuff: Sir?

Judge Garrett: Was there anything about this in the pleadings?

Mr. Knuff: You mean specifically, that we mentioned Cardiff Gypsum Company?

Judge Garrett: Yes.

Mr. Knuff: No, we did not specifically mention the Cardiff Gypsum Company.

Judge Garrett: Did you mention anything that would cover a situation such as that to which he testified?

Mr. Knuff: Yes, Your Honor. We mentioned two things that would cover that. We mentioned, first, that under paragraph 45(e) of the complaint, manufacturing distributors were excluded from the market; and, under paragraph 45(c)—let me restate what we said under paragraph 45(e):

Under paragraph 45(e) we charged that the defendants attempted to fix the resale prices of manufacturing distributors.

Then, under 45(c) of the complaint, we said that the defendants concertedly attempted to stabilize the price of plaster and other unpatented products.

Of course we offered it on both theories. The court received it on the theory it might show an attempt on [fol. 389] the part of defendants to stabilize plaster prices.

After Sensibar made his first trip to see Black, he went back there to see him a second time, and the second time Black told him that either U.S.G. had not given the consent, or else that he, Black, had refused, or had failed to ask U.S.G. for their consent; but, at any rate, some five or six weeks later Sensibar saw Black at a Gypsum association meeting, and at that time Sensibar was advised that U.S.G. refused to give their consent.

Then, in 1934, Sensibar contacted Certain-teed. He saw Mr. Henley at that time, saw him several times. Henley told him that he, Henley, had received a constant stream of complaints about Cardiff cutting the price on plaster. Sensibar explained the pricing policies of Cardiff to Henley, and when he went back, after contacting him at least on more than one occasion, Henley finally told him that U.S.G. would not give their consent.

Judge Garrett: As I understand you right now, you think that although the Supreme Court made no reference to this testimony, that nevertheless—and although it was admitted for a particular purpose,—nevertheless it should be considered for other purposes?

Mr. Knuff: Oh, no, Your Honor.

Judge Garrett: What do you mean, then?

Mr. Knuff: Let's take a look at Findings 115 to 119 and [fol. 390] see what we say there.

Judge Garrett: Perhaps I am detaining you unnecessarily, but I don't quite get your point.

Judge Jackson: You think it should be included in the findings of fact, because it is uncontradicted in the record?

Mr. Knuff: That is right.

Here is what Finding 115 says:

> "The Cardiff Gypsum Company has, for many years, owned and operated gypsum properties in the vicinity of Fort Dodge, Iowa."

Judge Garrett: Well, that is our finding of fact?

Mr. Knuff: No, this court before didn't make any findings on Cardiff Gypsum Company at all. These are the proposed findings that we are asking this court to make.

Judge Garrett: I see.

Mr. Knuff: Proposed Finding 115 says:

> "The Cardiff Gypsum Company has, for many years, owned and operated gypsum properties in the vicinity of Fort Dodge, Iowa, and operates a plaster mill at that place. Its plaster and other related products are widely sold throughout the Middle West. The company, at no time, manufactured gypsum board or lath. Its position in the gypsum industry has thus long been substantially that of Oakfield Gypsum Products Corporation, Connecticut Adamant Plaster Company, and [fol. 391] other manufacturing distributors named in the bill of particulars to the complaint."

Proposed Finding 116 states as follows:

> "Beginning in 1933, and continuing down through most of October, 1939, Sensibar, of Cardiff Gypsum

Company, contacted Universal, American, Certain-teed, U.S.G., National, and Ebsary, for the purpose of purchasing board from them at a discount. Each of the above companies, except U.S.G., signified its willingness to sell board to Cardiff at a discount, providing U.S.G. would give its consent to do so."

Proposed Finding 117:

"During this same period, U.S.G., and the above licensees, sold board at a discount to other plaster manufacturers, and in the case of the licensees, U.S.G. consented to the sale thereof."

Proposed Finding 118:

"During this same period U.S.G. refused to sell board at a discount to Cardiff and also refused to give its consent to its licensees to do so. Without U.S.G.'s consent, the licensees refused to sell Cardiff. Cardiff has never been able to purchase board at a discount from U.S.G. or its licensees."

Proposed Finding 119:

"The defendants have excluded Cardiff from the [fol. 392] board market, and this exclusion constitutes an unreasonable and undue restraint and monopolization of trade."

We are not asking this court to make any findings contrary to the theory upon which this evidence was admitted.

Chief Judge Stephens: The court will recess now until two o'clock.

Before we recess, may I ask the defendants if they have an extra copy with them of their proffer of proof?

Mr. Knuff: I have one here.

Chief Judge Stephens: I should have brought mine with me here. I may be able to locate it during the noon hour, but if not, I would like to borrow one.

I do not want to deprive counsel, unless they have an extra copy——

Mr. Connelly: I have an extra one.

Chief Judge Stephens: Is that an extra copy?

Mr. Connelly: Yes, sir.

Chief Judge Stephens: Proceed, Mr. Bailiff, and announce the recess.

The Marshal: This honorable court stands recessed until two o'clock.

(Whereupon, at 12:30 p.m., the court stood in recess until 2:00 p.m. that same day.)

[fol. 393] AFTERNOON SESSION

2:00 p.m.

Chief Judge Stephens: You may proceed, Mr. Knuff.

OPENING ARGUMENT ON BEHALF OF THE PLAINTIFF (Resumed)

By Mr. Knuff:

Mr. Knuff: Your Honors, when the court rose, I was discussing the exclusion of Cardiff Gypsum Company as a purchaser for board. I will not say anything further in that connection and will pass immedately to Finding 162. Finding 162 is a summary of the effects of all the previous findings from Finding 16 to 161. This finding states that the evidence establishes that the defendants associated themselves in a plan to blanket the gypsum board industry under patent licenses and stabilized prices, as charged in the complaint; that since the execution of the last of the 1929 licenses, competition at the price and quality and the service level has been eliminated in the industry.

This court previously found in Finding 118 that the evidence did not establish such a plan. Error was assigned to that finding. The Supreme Court sustained that assignment of error.

The Supreme Court said that despite the opportunity of the trial court to appraise the credibility of witnesses, that court could not rule otherwise than that Finding 118 was clearly erroneous. They said that at page 396 of the opinion.

The Government's position is that if Finding 118 was [fol. 394] clearly erroneous, obviously, Finding 162 must be

correct. It is simply the converse of what had previously been found by this court.

Findings 163 to 165 relate to acquisitions within the industry. We have set forth in our brief those acquisitions in the industry, and in the interest of moving this case along, I am going to ask the court to regard our brief as our argument on that position.

Judge Garrett: Those embraced the argument that if one company buys another, that constitutes, under circumstances related, the violation of the anti-trust laws?

Mr. Knuff: Yes, I would say that that represents the correct position that we will take here. Findings 163 to 165, set forth the fact that all the manufacturing facilities for board were concentrated in the hands of a few manufacturers and that this concentration of productive capacity made concerted action far less difficult to attain than it would otherwise have been; that the attitude of the present defendants has been that of mutual cooperation to suppress competition in order to organize the gypsum industry and stabilize prices; and that unless restrained from going further with those acquisitions, the defendants will acquire other companies in the future.

At page 712 of the Federal Trade Commission v. The Cement Institute, the Supreme Court said:

> [fol. 395] "When the Commission rendered its decision, there were about eighty cement manufacturing companies in the United States operating about one hundred fifty mills. Ten companies controlled more than half of the mills, and there were substantial corporate affiliations among many of the others. This concentration of productive capacity made concerted action far less difficult than it would otherwise have been."

Now, since in the Cement Institute case ten companies controlled more than half of the productive capacity, we take the position here that our case is a great deal stronger than were the facts in the Cement case.

Here we have three companies—U. S. G., National, and Certain-teed—controlling eighty-nine percent of the productive capacity for board. Those same three companies

control more than fifty percent of the productive capacity for plaster.

Unless these defendants are restrained from what I like to think of as industrial cannibalism—that is, one company swallowing up another company—we are going to reach a stage very shortly where there will be maybe one or two companies controlling all of the productive capacity for board. Of course, the Sherman Act is aimed at monopoly.

We have proposed seventeen conclusions which we think are proper for this court to make. The defendants have objected to each of the conclusions except the first one, [fol. 396] which relates to the jurisdiction of the court.

In their general objections to the conclusions, the defendants object to these conclusions for two reasons: First, they say that the proposed conclusions go beyond the scope of the determination of the issue, and, second, they say that the Government is not entitled to any conclusion with respect to the monopoly charge.

Their second objection—that is, that we are not entitled to any conclusions respecting monopoly—seems to me to illustrate the attitude that these defendants have taken. These defendants absolutely refuse to recognize the fact that the Supreme Court has once passed upon this case. The Supreme Court has said that the defendants have monopolized the gypsum board industry.

Here is what the Supreme Court said about that. It is at page 400 of the Supreme Court's opinion:

These licenses and bulletins show plainly——

Judge Jackson: Did you say page 400?

Mr. Knuff: Page 400 of the Supreme Court's opinion.

Judge Jackson: I did not know it was that long.

Mr. Knuff: It is reported in 333, beginning at 364. It is at page 400 of 333.

Judge Jackson: Do you know what page of the slip copy it is?

Mr. Connelly: Page 34.

[fol. 397] Judge Jackson: I have it right here.

Mr. Knuff: "These licenses and bulletins show plainly a conspiracy to violate the Sherman Act. Price fixing of this type offends. It is well-settled that price fixing without

authorizing statutes is illegal per se. Patents grant no privilege to their owners of organizing the use of those patents to monopolize an industry through price control, through royalties for the patents drawn from patent-free industry products, and through regulation of distribution. Here patents have been put to such uses as to collide with the Sherman Act's protection of the public from evil consequences."

I will omit the cases that they cite there. To continue:

> "The defendants did undertake to control prices and distribution in gypsum board. They did utilize an agency, Board Survey, Inc., to make this control effective. Such facts, together with other indicia of intent to monopolize the gypsum board industry, hereinbefore detailed as to the agreements, bulletins, and declarations, convince us that the defendants violated the Sherman Act."

We say that is an express ruling by the Supreme Court that these defendants have violated Section 2 of the Sherman Act.

The remaining objections that the defendants make to the conclusions are set forth in our brief. We have set forth first the conclusion that we make, second the objection to it, and then we point out the cases which support our [fol. 398] legal proposition. Those cases are, first, the present case on the appeal in the Supreme Court; second, the Line Material case—we quote from the Line Material case—we also quote from the American Tobacco case; we also quote from Swift v. U. S., 196 U. S.; we also quote from the International Salt case.

Every proposition that we ask this court to conclude is based upon what the Supreme Court has said in this case, in the related case of the Line Material, or in some other cases, and all those cases are set forth in our memorandum.

I am going to let our memorandum speak for itself, but I do want to ask this court to make one addition on page 105 of the brief, the memorandum that I have filed. It is at page 105, the last paragraph on that page, and it says, "The complaint, it will be noted . . ." Does the court see that?

In the third line from the bottom of the page, the next to the last word is the word "competition." After the word "competition," please insert a star or an asterisk or a foot note reference, whichever the court cares to do, and then in pencil insert at the bottom of the page:

> "Paragraph 84 of the complaint charges that U. S. G. acquired the starch patents for the purpose of fixing prices on board."

Judge Garrett: "The complaint charges that"—there is no finding, is there?

Mr. Knuff: Yes, we ask the court to make a finding of that.

[fol. 399] Judge Garrett: I mean there is no finding made by the Supreme Court.

Mr. Knuff: That comes back to our fundamental——

Judge Garrett: All right.

Mr. Knuff: I am not so sure that the Supreme Court did not make a finding on that, if Your Honor pleases. I want to say that when the Supreme Court in the Line Material case, at page 308, said, "By aggregating patents in one control, the holder of the patents cannot escape the prohibitions of the Sherman Act. See Standard Sanitary Manufacturing Company v. U. S., 226 U. S. 20; U. S. v. U. S. Gypsum Company, decided today," when the Supreme Court undertook to cite "U. S. v. U. S. Gypsum Company decided today," as authority for the proposition that patents cannot be aggregated in one control——

Judge Garrett: 387, did you say?

Mr. Knuff: 308.

Judge Garrett: 308?

Mr. Knuff: 308 of Line Material.

Judge Garrett: That cross reference, of course, there is a little confusing, but there is no use taking up any more time about it. Of course, in that case, that Line Material Company case, there was a concurrence by one of the justices, who wanted to wipe out the whole Electric case. I believe that is right.

Judge Jackson: Justice Douglas.

Mr. Knuff: Four of them wanted to overrule the General [fol. 400] Electric case and four of them were opposed to

overruling the General Electric case. So the General Electric case, while it was not buried in the Line Material decision, I think the net effect of the Line Material decision was to give it quite a generous dose of embalming fluid, so that I do not suppose the case will cause us very much trouble in the future. They did not, it is true, overrule it.

Judge Garrett: And in this case, the Gypsum case, which came just a bit later——

Mr. Knuff: Argued at the same time, the same day.

Judge Garrett: Argued at the same time and decided at the same time, but in the Gypsum case nobody dissented, did they?

Mr. Knuff: Unanimous opinion.

Judge Garrett: Unanimous opinion because the court had accepted what had been laid down in the Line Material case.

Mr. Knuff: In the Gypsum case the court said that the General Electric case did not apply. In the Gypsum case the Supreme Court said that the General Electric case did not apply to our situation.

That brings me now to the consideration of the proposed decree. The decree in this case was drafted to accomplish just two purposes, and only two purposes. First, to put an end to the specific illegal practices which have plagued the gypsum industry for twenty years, and, second, to restore to that industry a measure of competition, which [fol. 401] been absent from it so long.

To use the language of Mr. Justice Jackson in the International Salt case, "If this decree accomplishes less than both of those purposes, the Government will have won a lawsuit, but will have lost a cause."

We recognize, of course, that the end to be served by any equity decree is not the punishment for past transgressions. Certainly, equity courts should not impose penalties in the guise of preventing future violations.

As we will point out subsequently, none of the provisions of this decree do impose penalties. All of the provisions of this decree, we believe, are reasonably necessary if we are to accomplish the purposes of the Sherman Act.

In passing upon this decree, the court should keep in mind certain well-know- principles of equity. First, that in case

there are any doubts concerning the provisions of the decree, those doubts should be resolved in favor of the plaintiff.

I think Judge Stephens will recognize the case which so held as Local 167 v. U. S., because Judge Stephens argued that case in the Supreme Court, and the Supreme Court so held in Local 167.

Second, the decree may prohibit acts which in another setting would be unobjectionable.

Third, the provisions of this decree are not necessarily limited to enjoining in the future, acts of the identical nature which were committed in the past. In other words, [fol. 402] this decree can enjoin other acts, other related acts, although there is no evidence in the case that those acts were committed.

The defendants have objected to each section of the proposed decree, except Section No. 1, which deals with the jurisdiction of the court. Section 2 of the proposed decree deals with the definitions. We define "gypsum products," "said defendants," and so forth. We will allow the brief that we have filed to speak for our position on Section 2.

Section 3 of the proposed decree states that the defendants have combined and conspired to restrain trade in gypsum products and have monopolized, combined, and conspired to monopolize trade in gypsum board in violation of Sections 1 and 2 of the Sherman Act.

Judge Garrett: You left out the word "patented."

Mr. Knuff: I left out the word "patented" advisedly, because there is no evidence in this case that there was ever any board made under the terms of any patent. There is not a single witness who testified that any of the board that was made came within the provisions of either the Utzman patent, the Haggerty patent, or the Roos bubble patent.

There was some loose talk, I grant you, that starch was used to increase adhesion between the liner and the core, but not a single witness testified that the starch that was used conformed to the teachings of Haggerty; not a single witness—and I challenge the defendants, I hope that when [fol. 403] the defendants answer me, they will point out in this record any testimony showing that patented board was

ever manufactured. There is not a bit of testimony on that in this case. There is a contention, Mr. Bromley always contended that the only price that was fixed was the price on patented board, but there is no evidence that these defendants ever made board under the patents.

The only way I can prove that is correct is to assert it because I am trying to prove a negative. If the defendants say I am wrong on that position, then the defendants can certainly quote from the transcript, if it is there, the evidence which they rely upon. I am sure that they cannot find it in the transcript.

With reference to section 3, defendants U. S. G. and those defendants who have adopted the position taken by U. S. G. object to this section for the following reasons:

That the section fails to set forth in what respect the defendants have violated the Sherman Act, and, second, that under Section 2 the decree should be limited to patent board, and, third, that there was not any intent to monopolize under Section 2.

Well, I have already answered their objection as to patented board. Their first objection, that the section fails to set forth in what respect the violation has been committed, our answer to that is that the findings and the conclusions set forth in some detail the circumstances surrounding the violation of Section 1.

[fol. 404] We know of no principle of law that would require us to again set forth what we have set forth in the proposed findings of fact; nor do the defendants cite any cases in support of their proposition that we should. They simply repeat their former inaccurate position that this section goes beyond the scope of the court's determination upon the issue on the motion for summary judgment.

Their objection, that there was not any intent to violate Section 2, of course, is readily answered by the fact that when you have a per se violation of the Sherman Act, which you have in this case, then intent can make no difference. The Supreme Court has said that in Standard Sanitary, they have said that in the Griffith case and they have said that in numerous other cases, and in the cases where they have said that, we have set forth those cases in our memorandum.

[fol. 405] Section 4 of the proposed decree deals with the applicability of the decree. Under this section it is stated that the provisions applicable to any defendant shall apply to such defendant, its officers, directors, agents, and so forth.

Now, all the defendants object to this section of the decree and say that its provisions should be limited so as to bind only the corporate defendants; that the individual defendants should not be included.

U. S. G. says it is in appropriate in a case like this to enjoint the individual defendants who are not parties to the license agreement.

Now, I say that statement is inaccurate because every individual defendant that we have enjoined in this case, Hartley alone excepted, was a party to one or more of the license agreements, and we have set forth those license agreements to which they were parties in our memorandum.

Judge Garrett: Were they parties as officials or individuals?

Mr. Knuff: They were parties as officials, but parties nonetheless.

Judge Jackson: Those are the individuals, I assume, that are mentioned in the heading of the complaint as defendants.

Mr. Knuff: That is right. On the appeal of this case the Supreme Court did not sustain this court as to the individuals and say that this court was correct in dismissing as [fol. 406] to the individuals.

The Supreme Court reversed as to both classes of defendants, and on the appeal of this case the individual defendants, which we have mentioned here, were made parties to that appeal.

So I say that it certainly would not be in the public interest to allow the individual defendants to escape the provisions of this decree. How can we reach Mr. Gloyd otherwise? The Texas Cement Plaster Company is not even a corporation. I do not know how we can reach Mr. Gloyd unless we name Mr. Gloyd. Certainly, every defendant that we have named here actively participated in either the formation of this conspiracy or in carrying it out. Mr. Baker,

Mr. Avery, Mr. Knode, Mr. Tomkins, Mr. Ebsary, Mr. Gloyd—they all actively participated in it.

Judge Garrett: With respect to Mr. Gloyd, just as a matter of information, it seems to me that I had heard in some way—that would not affect the legal situation here, but it seems to me I had heard in some way that Mr. Gloyd had no interest now in this case.

Mr. Knuff: That is correct.

Judge Garrett: He sold out ot somebody else.

Mr. Knuff: That is right, he did that, but I do not go along with your proposition that that would not——

Judge Garrett: I am not making any proposition, I am just asking.

Mr. Knuff: That is correct. While this court had under [fol. 407] consideration the defendants' motion to dismiss sometime during 1945, Celotex, without knowledge to the Government and without, as far as we know, knowledge to this court, proceeded to buy the assets of Texas.

Judge Garrett: Texas was Gloyd?

Mr. Knuff: Texas was Gloyd, Gloyd was Texas.

Judge Garrett: Not a corporation?

Mr. Knuff: Not a corporation, Your Honor.

Judge Garrett: Well, I reckon if he is out of business, he would not object to being enjoined.

Mr. Knuff: Apparently he does because he has joined with U. S. G. in their objections.

Judge Garrett: The legal right to enjoin him might be another question. Go ahead.

Mr. Knuff: Now, that brings me to Section 5 of the proposed decree. Under Section 5 of the proposed decree the defendants are enjoined from continuing the concerted illegal practices heretofore carried on by them. For instance, the defendants are here enjoined from concertedly standardizing the product, from concertedly eliminating jobbers, classifying dealers, adopting uniform delivery practices, using the basing point pricing system, and such other concerted activities which the findings clearly indicate have been practiced by these defendants in the past.

Generally speaking, what is here enjoined are those con- [fol. 408] certed activities which are more particularly set forth in paragraph 45(a) to (c) of the complaint.

Judge Jackson: I was just wondering about that subdivision 4 on page 5: To refrain from selling or distributing gypsum product to any purchaser or class of purchaser. Are you forbidding them to sell their products?

Mr. Knuff: Concertedly.

Judge Jackson: That goes back to a preface here, does it?

Mr. Knuff: I am coming to that in just a moment, Your Honor. I am coming to that right now.

Judge Jackson: All right: I see, "a planned course of action."

Mr. Knuff: It will be observed that the prohibiting paragraphs of Section 5—that is, paragraphs 1 to 10 inclusive—are modified and limited by a preamble.

Now, the wording of that preamble is the identical wording of the cease and desist order that the Federal Trade Commission entered in the Cement case. I say it is identical, with this exception:

In the Federal Trade Commission order the Federal Trade Commission used the words "cease and desist". In what we say here, we say that the defendants are "enjoined and restrained."

Now, the Supreme Court passed upon that preamble in its opinion in the Cement case, and here is what the Supreme Court said about it:

> [fol. 409] "As we read the order, all the separate prohibiting paragraphs and subparagraphs, which need not here be set out, are modified and limited by a preamble. This preamble directs that all the respondents do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding or agreement, combination or conspiracy, between and among, any two or more of said respondents or between any one or more of said respondents and others not parties hereto to do or perform any of the following things."

Then follows the prohibitory sentences:

> "It is thus apparent", said Justice Black, "that the order by its terms is directed solely at concerted, not individual activity on the part of the defendants. Re-

spondents have objected to the phrase 'planned common course of action' in the preamble. The objection is two-fold: First, that it adds nothing to the words that immediately follow it, and, second, that if it does add anything, the Commission should be required to state what that novel phrase means in this order and what it adds to the four words.

"It seems quite clear to us what the phrase means. It is merely an emphatic statement that the Commission is prohibiting concerted action, planned, concerted action. The Commission chose a phrase perhaps more [fol. 410] readily understood by businessmen than the accompanying legal words of like import.

"Then there is objection to that phrase in the preamble would prevent respondents or any of them from doing the prohibited things with others not parties hereto.

"We see no merit in this objection. The Commission has found that the cement producers have from time to time secured the aid of others outside the industry who are not parties to this proceeding in carrying out their program for preserving the basing point pricing system as an instrument to suppress competition.

"Moreover, there will very likely be changes in the present ownership of cement mills and the construction of new mills in the future may be reasonably anticipated.

"In view of these facts, the Commission was authorized to make its order broad enough effectively to restrain respondents from combining with others as well as among themselves."

Judge Garrett: Now, to what phase of this case does that rule apply?

Mr. Knuff: That rule applies to the preamble, to Section 5 of this case. We have quoted, we have set forth in the preamble of Section 5——

Judge Garrett: I am not talking about what is in your complaint.

[fol. 411] Mr. Knuff: I am not talking about the complaint. I am talking about the decree, Your Honor.

In our decree, under Section 5 we set forth verbatim what the Federal Trade Commission did in its cease and desist order, and then we follow that by enumerating the concerted illegal activities which are enjoined.

Judge Garrett: I know, but what I am trying to get at is: What are the facts in this case to which the facts in that case are applicable?

Mr. Knuff: I am coming to that right now.

Judge Garrett: Good.

Mr. Knuff: Subparagraph 1 of Section 5 enjoins and restrains the defendants from concertedly fixing prices, terms, and condition of sale at which gypsum products shall be sold or resold.

Now, the charges in the complaint directly relating to that are paragraphs 45(a), 45(c), and 45(e). The findings supporting those charges are those which we set forth in the memorandum. I am going to go into all those findings.

The Supreme Court said, "Price fixing of this type offends." In subparagraph 1 we are enjoining the defendants from concertedly fixing prices, terms, and conditions of sale.

This is a price-fixing case. We are enjoining the defendants from further fixing prices in this industry.

Judge Garrett: By reason of their base for freight rates [fol. 412] or something, was it not? That is what was in this Cement case, was it not?

Mr. Knuff: The Cement case was a complaint instituted——

Judge Garrett: It is the old Pittsburgh-plus doctrine, is it not?

Mr. Knuff: That came into the case, but it came in as a corollary to the main question involved. The main question involved was price fixing.

The first count in the Federal Trade Commission complaint said that the defendants suppressed competition in violation of Section 5 of the Federal Trade Commission Act. They said they did it as a result of a conspiracy.

Count two of the Federal Trade Commission case carried over the combination and conspiracy charge of the first count and said that the defendants, in violation of Section 2 of the Clayton Act, discriminated in price.

Under count one you had a price-fixing case, which was made effective by the basing point system. In our case you had a price-fixing case, which was made effective by use of patent licenses plus the basing point.

Do I make myself clear on that, Your Honor?

Judge Garrett: Yes, I understand your position, I think.

Mr. Knuff: Subparagraphs 2 and 3 of this section of the proposed decree present related phases of a common problem. Subparagraph 2 enjoins the defendants from taking [fol. 413] affirmative action to produce uniform kinds of board or from adopting uniform methods of manufacturing, selling, or distributing those same products. Subparagraph 3 enjoins the defendants from resorting to negative means to accomplish the same ends.

The defendants in this case, as the evidence showed, undertook to standardize board in order to protect the price. They eliminated No. 2 board, they eliminated seconds. They also eliminated open-edge board.

These subparagraphs are intended to take care of just that situation. Now, it will be noted, if Your Honors please, that the prohibited uniformity here only applies where the uniformity is brought about for the purpose of fixing prices.

In other words, if National wants to make a quarter-inch board, National can go ahead and make a quarter-inch board. We are not going to worry about that. If Ebsary wants to make a three-eighths board, Ebsary can go ahead and make three-eights-inch board. But National and Ebsary cannot get together and say, "We will make only three-eighths-inch board, and we will do this so that we can fix the prices."

Paragraphs 4 and 7 also are related. Under subparagraph 4 of this section of the proposed decree the defendants are enjoined from concertedly refraining from selling or distributing gypsum products to any purchaser or class of purchaser.

That is aimed directly at the jobber situation. The Supreme Court said that the defendants have concertedly [fol. 414] eliminated jobbers. That is under Section 4.

Then, under subparagraph 7, which is the affirmative phase of subparagraph 4, the defendants are enjoined from concertedly agreeing upon a basis for the selection or the

classification of customers. The finding in support of that is Finding 137.

You will recall that Mr. Lenci testified that at the meeting of June 6 there was brought up for discussion whether or not mail order houses were to be sold with an additional discount over and above that applying to dealers. There was also discussed at that meeting whether or not house wreckers or bathtub yards were to be sold as dealers.

Judge Garrett: Or the Government.

Mr. Knuff: Or the Government. Now, subparagraph 7 is aimed at preventing the defendants from classifying dealers as an aid to price control.

Subparagraphs 5 and 6 of this section of the proposed decree enjoin the defendants from concertedly using the basing point delivered price system in the sale of gypsum products.

Now, it has long been recognized that the use of this basing point pricing system is a handy instrument to bring about the elimination of any kind of price competition. The Supreme Court said that in the Cement case.

Now, the charge in the complaint directly involved is paragraph 45(a), fixing of prices.

On the appeal of this case the Supreme Court has said, at [fol. 415] page 382—and here is what they said:

> "The bulletins adopted a basing point system of pricing."

Mr. Lenci testified to the same effect. He testified to that at transcript page 4061, but, regardless of what Mr. Lenci said or regardless of what the Supreme Court said, it can be demonstrated by the facts of this case that it was the bulletins that did introduce this system into the industry. Note, please:

The essence of any basing point pricing system is that it always results in identical prices at any point in the United States. It always results in identical prices at any given point in the United States.

Now, the evidence in this case is clear, and the defendants throughout have insisted upon it, that prior to 1929, there was a price war in this industry. If there was a price war

in this industry, prices were not identical. If prices were not identical, the basing point system was not used.

In order to clarify, or, probably, in order to make sure that what was said in the opinion on the appeal of this case could not possibly be misconstrued, the Supreme Court, six weeks after they decided this case, also went out of its way to point out that they were condemning the basing point pricing system used in the gypsum industry, because in the Cement case here is what they said, and it appears at 721 of the Cement opinion:

> [fol. 416] "That the basing point price system may lend itself to industry-wide and anti-competitive practices is illustrated in the following, among other cases: U. S. v. U. S. Gypsum Company, et al., 333 U.S. 364; Sugar Institute v. United States, 297 U.S. 553."

Subparagraph 8 of this section of the proposed decree enjoins the defendants from concertedly agreeing upon or adhering to any method or practices in the selling, shipping, or distribution of gypsum board.

It will be recalled that when the Supreme Court said that the evidence in this case clearly shows that among the uniform practices adopted by the industry and followed since 1929 were the following—and I am quoting from 383 of the Supreme Court opinion:

> "Specified board sizes and minimum quantities were prescribed, licensees were forbidden to employ commission salesmen without the written consent of the licensor, regulations were prescribed as to the size, quantity and markings of gypsum board used for packaging shipments, granting of long-term credit was prohibited, sales on consignment were enjoined and licensees were forbidden to deliver board directly to the building site."

Now, the charge in the complaint directly relating to this subparagraph of this section is again paragraph 45(a), the price section. We are asking this court to enjoin these [fol. 417] defendants from adopting uniform practices of selling, shipping, or distributing gypsum products for the purpose and with the effect of fixing prices.

Subparagraph 9 of this section of the proposed decree enjoins the defendants from concertedly policing or investigating the prices and conditions of sale at which gypsum products are sold.

Now, again, the charge in the complaint directly relating to that is paragraph 45(a) of the complaint. The Supreme Court passed upon this phase of the case, and the Supreme Court said:

> "The defendants did undertake to control prices and distribution in gypsum board. They did utilize an agency, Board Survey, Inc., to make this control effective. Such facts, together with the other indicia of intent to monopolize the gypsum board industry, hereinbefore detailed as to the agreements, bulletins, and declarations, convince us that the defendants violated the Sherman Act."

Section 9 or, rather, subparagraph 10 of Section 5 of the proposed decree enjoins the defendants from holding meetings or conferences with the purpose or with the effect of aiding or maintaining uniform prices.

Now, Your Honors will recall the number of licensee meetings that were held, and what we are enjoining is the holding of those meetings for the purpose or with the effect of fixing prices. If they want to get together socially, if [fol. 418] they want to get together for the purpose of education, we have no objection at all to that, but we ask this court to enjoin them from holding meetings for the purpose and effect of fixing prices.

Judge Garrett: Where is that in this?

Chief Judge Stephens: Page 6 of the decree.

Mr. Knuff: That brings me to Section 6 of the proposed decree, and this is the section that provides for compulsory reasonable royalty licenses. It will be noted that Certainteed, Celotex, National, Ebsary, and Newark do not object to this section of the decree. The only objectors to this portion of the decree are Texas and U.S.G., and as Judge Garrett said sometime ago, Texas is no longer in business.

In fact, Mr. Finck, in the objections which he filed on behalf of National, takes the position that he approves of the

Government's position insofar as this court should direct U.S.G. to grant compulsory reasonable royalty licenses.

Subparagraph 1 of this section directs U.S.G. to grant to any applicant a non-exclusive license to make, use, and vend on a reasonable, non-discriminatory royalty basis the inventions covered by the patents now owned or hereafter acquired by U.S.G. relating to gypsum products or their processes or their methods of manufacture or their uses.

As I have tried to point out in my discussion under Sec- [fol. 419] tion 5 of this decree, Section 5 enjoins past misconduct.

Chief Judge Stephens: Wait just a moment. Judge Garrett has misplaced his copy of the proposed decree.

Mr. Knuff: Since I assume we are going to take a recess very shortly, I can get a copy in five minutes from the Department.

Chief Judge Stephens: We will take a recess at 3:15.

Judge Jackson: I have an extra copy here.

Chief Judge Stephens: Proceed.

Mr. Knuff: As I was stating, Section 5 of the proposed decree relates to practices which are enjoined under the decree, practices which the defendants have, in the past, carried out.

Section 6, on the other hand, is intended to pry open to competition a market that has been closed by the defendants' illegal conduct.

As early as 1911 the Supreme Court laid down the rule, which district courts were to follow in formulating decrees in cases involving actual monopolization under the Sherman Act.

The Supreme Court said that in cases where conspirators have successfully restrained trade and monopolized an industry, a judgment which merely prohibited repetition of past misconduct would not accomplish the purposes of the Sherman Act.

That was said in the first Standard Oil case, and here is the exact language that Chief Justice White used. It appears at pages 77 and 78 of the 221st volume of U.S. Reports:

[fol. 420] "It may be conceded that ordinarily where it is found that acts have been done in violation of the

statute, adequate measure of relief would result from restraining the doing of such acts in the future. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling principles.

"As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted, the application of remedies two-fold in character becomes essential: First, to forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute; second,"—and this is the important portion—"the exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."

The defendants' monopoly in this case has rested upon the misuse of a series of patents which ostensibly control the technology of the industry and gave to U.S.G. and the other defendants the power to fix prices and to exclude [fol. 421] others from the industry.

That power has been used. U.S.G. has fixed prices. The industry has excluded jobbers, and the industry has excluded Cardiff Gypsum Company.

So long as U.S.G. retains this power to exclude others, the force of that power cannot be broken simply by injunction. The very nature of that power enables U.S.G. to exercise it by inaction. No affirmative conduct is necessary.

Simply by the device of refusing to license, U.S.G. can bar new competition from coming into this industry. They now do not have to act concertedly. This conspiracy has a momentum that will carry on. All that U.S.G. has to do is to refuse to license, and no one can get into the industry.

U.S.G. intends to use that power.

Judge Garrett: Where does that carry us in patent law? I mean where would your proposed decree carry us?

You intend, I presume, by this proposal to compel a man who owns a patent to grant a license to anyone who may seek it upon terms fixed by whom?

Mr. Knuff: If the parties can agree—well, when you say "terms", do you mean royalty?

Judge Garrett: Well, whatever it may mean. It is how you handle the patent.

Mr. Knuff: I am coming to that discussion—I will discuss those points later on, and if I can delay the answer to Your [fol. 422] Honor's question until that time, I would rather do it.

Judge Garrett: Very well.

Mr. Knuff: U.S.G. in their proposed——

Chief Judge Stephens: I would like to hear your answer to that part of Judge Garrett's question which you did not postpone. He asked you if you contend that by this form of decree hereafter everyone having a patent would be compelled to grant a license to whoever applies. You did not reply to that.

Mr. Knuff: Will the reporter please state Judge Stephens question again?

Chief Judge Stephens: I will restate it.

Judge Garrett asked you if you intended by this decree, notwithstanding the patent laws as they now stand, to compel everyone who owns a patent to grant a license to whoever applies for it.

Mr. Knuff: No, to answer your question directly——

Chief Judge Stephens: It is not my question. It is Judge Garrett's question.

Mr. Knuff: To answer Judge Garrett's question, I do not contend that simply because somebody owns a patent, that he is compelled to issue reasonable royalty licenses.

I do contend that where an anti-trust defendant has misused a patent, such as we have in this case, then the court can, in order to dissipate the effects of that misuse, the court can in such circumstances order compulsory reasonable [fol. 423] royalty licenses, and I will cite as authority the decisions of the Supreme Court on that question in just a

moment. There have been two recent cases in the Supreme Court: Hartford Empire v. United States, reported in——

Chief Judge Stephens: In view of the fact that both the proposed decree submitted by the defendants and the proposed decree submitted by the Government include provisions for compulsory licenses, why is there any reason for arguing at such length?

Mr. Knuff: The defendants' proposed decree does not. Their proposed decree only grants to the defendants in this case a license. We want any person, whether a defendant in this case or not——

Chief Judge Stephens: I see. Judge Garrett's question was pertinent, therefore. You contend that U.S. Gypsum Company must from now on, because it has been a defendant in this case, grant a license to anyone in the world who manufactures gypsum products?

Mr. Knuff: That is our contention.

Chief Judge Stephens: All right.

Judge Garrett: Under the present patents or under any patents that may hereafter be acquired?

Mr. Knuff: Patents presently owned or patents subsequently applied for and issued. I will come to the cases on that.

The case of Hartford Empire, et al., v. United States, [fol. 424] reported 323 U.S., was an anti-trust civil action involving misuse of patents wherein Hartford Empire and the others were charged with conspiracy to restrain trade, with conspiracy to monopolize commerce, and with monopolizing commerce by acquiring patents covering the manufacture of glass-making machinery, and by excluding others from a fair opportunity to engage in such commerce.

Judge Garrett: I have interrupted you so ofter that I feel ashamed of myself for interrupting again, but will you permit me to ask this? Is there anything in the decision of the Supreme Court in this case or in any current case which justifies any such ruling as that?

Mr. Knuff: Yes, that is what I am coming to. It is as current as 1945. The Hartford Empire was decided in 1945. The National Lead case was decided in 1947, I think, although I am not sure. I will point out another case as late as October, 1948, a District Court case.

Judge Garrett: All right. I will try and keep quiet now.

Mr. Knuff: All right. I do not mind your interrupting me.

Paragraph 24 of Judge Kloeb's decree in the Hartford Empire case provided as follows.

Judge Jackson: Judge who?

Mr. Knuff: Judge Kloeb, K-l-o-e-b. He was the Judge who heard the Hartford Empire case in Ohio, and para-
[fol. 425] graph 24 of his final judgment enjoined the defendants—that is, Hartford Empire and the others—from engaging in the distribution of machinery used in glass manufacture or in the distribution of glassware in interstate commerce unless each filed with the court an agreement: "(a), to license, without royalty or charge of any kind, and for the life of all patents, any applicant to make any number of machines embodied in the invention covered by any patent or patent applications now owned or controlled by such defendants, (b), to license, at reasonable royalty, to be fixed by the court in case of dispute, any applicant to make any number of machines embodying inventions covered by patents hereafter applied for or owned or controlled by any defendant."

Justice Roberts, in passing upon that section of Judge Kloeb's decree, at page 417 of the Supreme Court opinion, said this:

> "Paragraph 24(a) of the decree should be modified to permit the reservation of reasonable royalties and its provisions should be restricted to feeders, formers, stackers, and lehrs.
>
> "Paragraph 24(b) should be limited in respect to future applications and resulting patents or patents hereafter acquired by assignment, to those covering feeders, formers, stackers, and lehrs."

The only thing that the Supreme Court did with Judge
[fol. 426] Kloeb's decree was to strike out under paragraph 24 the royalty-free provision and say that you must allow Hartford Empire reasonable royalties.

And then they limited it to feeders, stackers, and lehrs; but in both situations the Supreme Court said that Hartford

Empire was to grant to anyone a reasonable royalty license under patents then owned or thereafter acquired.

That decision has not been reversed.

Chief Judge Stephens: We will take a 15 minute recess at the present time.

(A short recess was taken.)

[fol. 427] Mr. Knuff: When the court rose, I was just coming to the decision in the case of U.S. v. National Lead Company, reported in 332 U.S. at 319.

That case, like this one, was also a civil anti-trust suit involving misuse of patents to control and regulate the manufacture and sale of titanium pigment and compound in the United States.

Judge Rifkind, in formulating the decree in that case, put in Clause 7, and that clause provides as follows:

> "Each of the defendants is ordered to grant to any applicant therefore, including any defendant or co-conspirator, a non-exclusive license under any or all of the patents as herein defined at uniform reasonable royalty."

The Supreme Court affirmed the action of Judge Rifkind.

Now, I want to call Your Honors' attention to the decree that was entered in the District Court of the United States for the Eastern District of Wisconsin, in the companion case to this one in the Supreme Court,—that is the Line Material case.

On October the 19th, 1948 the District Court there entered a final judgment ordering the defendants to grant reasonable royalty licenses and the action taken at that time was not, in any sense, a consent decree, because the provisions of the decree which I had placed on the bench for [fol. 428] the use of Your Honors, clearly indicate that the judgment was entered after argument.

Now, if the court will compare the provisions of Article 5 of the Line Material decree, with the provisions of Section 6 of the decree which we ask this court to adopt in this case, I think that you will find that, for all practical purposes, both decrees are identical.

Subparagraph 2 of this section enjoins the defendant

U.S.G. from transferring its patents, without making provision for the transferee to grant reasonable royalty licenses. That section was incorporated in the decree for the purpose of preventing U.S.G. from by-passing this decree by transferring to friendly hands the patents that they have, and then taking licenses back.

We don't say that U.S.G. will do that. On the contrary, we are not compelled to assume that they won't do it. The provisions, we feel, are reasonable and should be included in this decree.

Subparagraph 3 of this section enjoins the defendants from including in the decree, any conditions whatsoever except the following:

> "(a) The license may provide that it may not be transferred——"

Judge Jackson: Are you reading from the line——

Mr. Knuff: No, I am going on.

[fol. 429] Judge Jackson: I missed your page there, Mr. Knuff. What page is this particular portion of the decree you are reading from now, on—that you are arguing?

Mr. Knuff: In my——

Judge Jackson: No, no, in your proposed decree, that is what you are talking about now, is it not?

Mr. Knuff: Compulsory licenses.

Judge Jackson: On page 6?

Mr. Knuff: Yes, sir, beginning on page 6, and I have disposed of subparagraph 1; I have just finished talking about subparagraph 2; and I am now coming to discuss subparagraph 3.

Chief Judge Stephens: Mr. Knuff, you will have to hurry along. The day is passing.

Mr. Knuff: I realize that, sir.

Chief Judge Stephens: We cannot sit more than two days on this, and the defendants are entitled to a substantial period of time. There are a great many of them. We can't give it all to the Government.

Mr. Knuff: I realize that.

Subparagraph 3 provides the license may not be transferred; that the license may provide for reasonable royalties, provided the royalty reserve may not be imposed on

patent free products; that the license may provide for its cancellation in the event that the licensee fails to pay the royalty reserve; that the license must provide that the licensee may cancel the license on 30 days notice; and [fol. 430] further, that the license must provide for a more favored nation clause; and finally, it is provided in this subparagraph that the license may not contain any provision allowing U.S.G. to inspect the books of any licensee.

I will allow the brief which we have submitted to state our position as to that paragraph, as well as subparagraphs 4, 5, and 6, and that will bring me then to discuss the question of the cancellation of licenses.

I do not think the court is going to have too much trouble in disposing of this section of the decree, because, if I understand U.S.G.'s position correctly, they do not object to the cancellation of the existing licenses. All that they object to are the words that we use to express that idea.

Well, the reason we use the broad language that we did, was: We didn't know what licenses might have been entered into subsequent to the last hearing on this case.

If U.S.G. will certify to this court that they have not any additional licenses, other than the ones that they refer to in their objection; and, if each licensee, in turn, will certify that they have not any other licenses, other than what is set forth in the objection, we have no objection at all to having the provisions of this decree specify the licenses that U.S.G. mentions in their memorandum.

Section 8 of the proposed decree is the tying clause [fol. 431] relating to sales of other gypsum products. Under this section of the proposed decree, U.S.G. is enjoined, as well as are the other defendants, from tying to the sales of gypsum products the sales of any other products.

I think that I will allow the court to take what we say in our brief as our position on that matter.

Section 9 of the proposed decree relates to sales on non-discriminatory basis.

Now, this section of the proposed decree directs the defendants to sell gypsum board to any other manufac-

turer of gypsum products at non-discriminatory prices, terms, and conditions.

The findings that relate to that are Findings 115 to 119. Those are the findings relating to the exclusion of the Cardiff Gypsum Company.

Judge Garrett: You mean, those are the findings you wish us to make.

Mr. Knuff: Well, I want you to make those findings, and I want you to also adopt this section of the proposed decree, based upon those findings.

Judge Garrett: I understand.

Judge Jackson: You are tying this up to the findings you propose?

Mr. Knuff: That is right.

Now, this provision is the identical provision that ap- [fol. 432] peared in the International Salt case. It is taken, verbatim, from what the Supreme Court said in the International Salt case.

In the International Salt case, the International Salt people objected to having this provision in the decree because, they said, that there was nothing in the evidence at all showing that they discriminated in the sales or the leasing of their patented machines.

The Supreme Court did not agree with the position taken by International Salt, and here is what the Supreme Court said:

> "We cannot agree that the consequences of proved violations are so limited. The fact is established that the appellant already has wedged itself into this salt market by methods forbidden by law. The District Court is not obliged to assume, contrary to common experience, that a violator of the anti-trust laws will relinquish the fruit of his violations more completely than the court requires him to do. And advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market. When the purpose to restrain trade appears from a clear violation of the law, it is not necessary that all the untraveled roads to that end be left open, and only the worn ones be closed."

Section 10 of the proposed decree enjoins each of the corporate defendants, and Samuel M. Gloyd, while engaged [fol. 433] in the manufacture and sale of gypsum products, from acquiring or purchasing, directly or indirectly, the business or assets, or capital stock or bonds, of any other defendant.

Subparagraph 2 enjoins each of the above-named persons, while engaged in the manufacture and sale of gypsum products, from acquiring or purchasing the business or assets or any measure of control over the business of any competing corporation or individual so engaged, unless such acquisition is approved by the court, after reasonable notice to the Attorney General with an opportunity to be heard.

The provisions of subparagraph 3 are substantially similar to those of subparagraph 2. Under subparagraph 3, the named defendants, while officers or directors of any corporate defendant engaged in the manufacture or sale of gypsum products, are enjoined from purchasing or acquiring any measure of control through ownership of stock or otherwise of any corporation, firm, or individual so engaged competing with the corporation with which he is officially connected.

Now, these provisions, subparagraphs 1, 2, and 3, are taken from what the Supreme Court did in the Hartford-Empire case.

Judge Kloeb, in his final decree in that case——

Judge Garrett: Pardon me. I promise not to interrupt any more, but: You mean the Supreme Court, did the Supreme Court issue that decree?

Mr. Knuff: They told the lower court what to do when [fol. 434] the case was up there on appeal. I am coming to what the Supreme Court said about that now.

Judge Garrett: All right.

Mr. Knuff: In paragraph 36(a) of Judge Kloeb's original decree in that case, the corporate defendants, while engaged in the manufacture of machinery to be used in the manufacture of glassware, were enjoined from acquiring, purchasing, holding or controlling, directly or indirectly, or through agents, representatives, or nominees, any of the assets except goods or merchandise purchased

in the ordinary course of business, or any of the capital stock or bonds or other evidence of indebtedness of any other defendant corporation.

Now, the Supreme Court passed upon that section of the decree, and here is what the Supreme Court said:

> "Paragraph 35 enjoins each individual defendant from holding, at the same time, an office or directorship in more than one corporation which manufactures and sells glassware, or manufactures or distributes glass-making machinery. The injunction is not limited to directorships in more than one of the defendant corporations. The same comment applies as has been made with respect to paragraph 33. There may be many instances when the normal freedom to act as a director of more than one company will in no wise conflict with the policies of the anti-trust law or tend to the fostering of practices which those laws forbid. [fol. 435] The same considerations apply to paragraph 36(a) and to 36(b), which should be limited to the acquisition of the business or assets of a competing corporation by a corporate defendant, and by any officer of a corporate defendant, of the business or all the assets of a competing concern, unless the acquisition is approved by the court."

And, at page 425 of the opinion of the Supreme Court, the Supreme Court said, "The decree should be modified to prohibit the acquisition of stocks or bonds of any corporate appellant by any other such appellant."

Now, on the remand of this cause, the former decree was modified, and here is the way in which it was modified: Paragraph 25(a) was the paragraph that took care of former paragraph 36(a); and paragraph 25(a) reads as follows:

> "The defendants, Hartford-Empire (naming those defendants) while engaged either in the manufacture and sale of glassware or in the manufacture or distribution of machinery used in the manufacture of glassware, or both, be and hereby is perpetually enjoined from acquiring, purchasing or, for more than 30 days after the entry of this judgment, from holding,

or controlling, directly or indirectly, or through agents, representatives, or nominees, the business or assets or capital stock or bonds of any other such defendant corporation."

[fol. 436] In other words, Judge Kloeb enjoined one defendant from acquiring the assets or the capital stock of another defendant.

Now, I think that, in view of the time that I have already taken, I will allow what I say in my brief to take care of the other situations mentioned in this section of the decree.

I want to come now to Section 11, and before I take up Section 11 of the decree, I want to ask the court to turn to page 12 of the decree.

Judge Jackson: Your proposed decree?

Mr. Knuff: Turn to page 12 of the proposed decree, because I am going to suggest one little modification there which will take care of the objection some of the defendants have raised, and I think it would be acceptable to us.

The third line of this section, the third word in, is the word "permitted."

Does the court see that?

Judge Garrett: You mean from the top?

Mr. Knuff: The third line of Section 11, about the middle of the page.

Judge Garrett: Oh, yes.

[fol. 437] Mr. Knuff: The third word in, is "permitted." Do you have that?

Judge Garrett: Yes.

Mr. Knuff: Insert a comma after the word "permitted" and then add these six words——

Judge Jackson: You mean, insert them right after the word "permitted"?

Mr. Knuff: After "permitted," add these six words: "Subject to any legally recognized privilege,".

Judge Garrett: "Subject to any——"

Mr. Knuff: "legally recognized privilege,".

Section 11 will then read that "The Attorney General of the United States, or his proper representatives, shall, for the purpose of securing compliance with this decree, be permitted, subject to any legally recognized privilege, one, access, and so forth."

That brings me to Section 12 of the proposed decree, and that relates to costs.

Well, it is Hornbook law, of course, that the sovereign does not pay any costs. We have assigned cases in support of that. There is no authority to tax any of these costs on the Government. We think this Section of the proposed decree should be adopted.

Then, Section 13 of the propsed decree provides that jurisdiction of the parties be retained. Well, that is the [fol. 438] usual provision in anti-trust decrees, and I have assigned in my brief the reasons why this action should be adopted.

Judge Jackson: Will you turn back to page 4 for just for one second, Mr. Knuff?

Mr. Knuff: All right, sir.

Judge Jackson: In that paragraph identified with the Roman numerals IV, what would that mean, that the attorneys shouldn't defend an anti-trust suit? You say "The provisions of this decree applicable to any defendant shall apply to the defendant, its officers, director, its agent, attorneys, servants and employees to each successor and assigns and to all persons acting or claiming to act under, through, or for such defendant or—" does that mean that if an attorney should act on behalf of any of these defendants, or under their orders, or in their interests,—he is enjoined from doing that?

Mr. Knuff: No, I haven't mentioned attorneys at law. I have mentioned attorneys, in the usual sense. I haven't said "attorneys at law."

Judge Jackson: Oh, yes, I see what you mean.

Chief Judge Stephens: I thought you did mean attorneys at law.

Judge Jackson: So did I.

Chief Judge Stephens: And I wondered if a corporate defendant or individual defendant, charged with violation of the anit-trust laws, must hire his attorneys in the future [fol. 439] only at the peril of making them subject to a decree like this, if he loses the case.

Mr. Knuff: Oh, no.

Judge Garrett: What do you mean by "attorneys"?

Mr. Knuff: Any person acting in a representative ca-

pacity, simply a synonym for agent. You can leave it out if you want to.

Judge Jackson: As attorney in fact. You could leave it out and it has the same meaning.

Mr. Knuff: Yes, leave it out if you want to.

Now, I think I am going to reserve any time that I might have, I don't know whether the court will be indulgent enough to grant me any additional time to reply, but I have pointed out, in this brief, that we do not want the provisions of Article 7 of the defendants' proposed decree superimposed upon our decree; and, the reasons for that are set forth in our memorandum, and I will allow our memorandum to speak for us.

Chief Judge Stephens: Which is Article 7?

Mr. Knuff: It appears on——

Judge Jackson: Page 85.

Mr. Knuff: On page 85. It says "This decree shall have no effect with respect to defendants' acts and operations without the United States."

Judge Jackson: That is in your portion, your proposed decree, isn't it?

[fol. 440] Mr. Knuff: No.

Judge Jackson: I think it is.

Mr. Knuff: No, Your Honor, it is not. I haven't any objections to the defendants saying or,—I do not have any objection to having a new section added to this decree, to be known as Section 14——

Chief Judge Stephens: Is that in your own decree?

Mr. Knuff: In our own decree, yes, sir. I have no objection to having a new section added to it, to be known as Section 14, which will, in substance state that the provisions of this decree are not intended to——

Judge Jackson: To conflict?

Mr. Knuff: To conflict with the——

I have set it forth here in my memorandum, and probably I can find it.

Section 14 would read:

> "Nothing contained in this decree shall be deemed to have any effect upon the operations or activities of said defendants which are authorized or permitted by the

Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or the Act of Congress of August 17, 1937, commonly called the Miller-Tydings Act, or by any present or future Act of Congress or amendment thereto; provided, however, nothing contained in this section shall in any manner affect the provisions of Section 6 of this decree."

[fol. 441] What we specifically object to in the defendants' proposed Article 7, is the first four lines that they have there.

Chief Judge Stephens: Down to the semi-colon?

Mr. Knuff: That is right, down to the semi-colon.

Chief Judge Stephens: Well, you are adding some other lines into the bottom too, are you not, Mr. Knuff? Perhaps you had better inform our colleagues what they are, in more definite language. There is some reference back to Article 6.

Mr. Knuff: That's right. We want to make sure that nothing in this new Section 14, if it is added, will in any way limit the provisions of Section 6, which are the provisions relating to compulsory licenses.

Judge Garrett: Won't you please put that in typewriting?

Mr. Knuff: It is in print.

Judge Jackson: Well, you have that included right in there, your Section 14, proposed: "Nothing contained in this decree shall be deemed to have any effect upon the operations or activities, et cetera, and nothing contained in this section shall in any manner affect the provisions of Section 6 of this decree."

It is there.

Mr. Knuff: That is right.

Chief Judge Stephens: It is on page 164.

Judge Jackson: That particular portion.

Chief Judge Stephens: I thought, when you said your [fol. 442] memorandum, you meant your oral or speaking memorandum.

Chief Judge Stephens: All right, Mr. Connelly.

By Mr. Connelly:

Mr. Connelly: May it please the court, it is quite evident, I think, from what has been said here today, that the plaintiff's position is that the granting of the motion for summary judgment in its favor was equivalent, in all respects, to an adjudication, in its favor, on all of the issues presented by the pleadings, and indeed, on some issues which have not been presented by the pleadings.

The entire, rather complex proposed decree which it has submitted; the voluminous findings, and the conclusions, all presuppose and are predicated upon a conspiracy of the broadest possible scope; a conspiracy not confined to fixing the price of gypsum board, but a conspiracy to fix the price and regulate the production and sale of all kinds of gypsum products, patented and unpatented; a conspiracy not limited by territory; a conspiracy which includes, as one of its objectives, according to the Government, the maintenance of resale prices, as well as original prices.

Many other provisions in the proposed decree submitted by the Government are justifiable, if at all, only on the assumption that this court has found a scheme or plan among the defendants to fix prices in the industry, and the [fol. 443] patent license agreements were not bona fide patent licenses, but were used as a sham to disguise that illegal purpose.

Our understanding of this court's decision is a different one.

As we understand it, the holding by this court, or by a majority decision, was predicated upon the defendants entering into license agreements with the price provisions; and, upon the issuance pursuant to those price provisions, of price bulletins; and, upon the action taken thereunder; the adherence to price provisions of the licenses and to the bulletins with knowledge by each of the adherence thereto by the others.

All that in good faith, and in the belief that, albeit a mistaken belief, that that action and those agreements were proper and lawful, under the doctrine announced by the Supreme Court in the General Electric case.

Now this court, of course, has in mind clearly the scope of its own determination, and I do not propose to presume to make any comments with reference to this court's determination in that connection.

I should, however, like to comment very briefly upon certain aspects of the Supreme Court decision as bearing upon this question that is now before us, of the proposed findings, conclusions and decree, because I take it that without the Supreme Court opinion, we would have a judgment for the defendants and would not now be discussing the possibility, [fol. 444] or discussing the judgment for the plaintiff, and the form of that judgment.

Now, the Supreme Court did, as I see it, three things in its decision: In the first place, it held that, so far as the evidence introduced in the plaintiff's case is concerned, that that made out a prime facie case and therefore it required a reversal of this court's prior decision.

Secondly, the Supreme Court made certain statements as to the law applicable to the situation of a plurality of license agreements with price-fixing provisions, which this court held to be applicable to the admitted, undisputed facts in this case; and, on the basis of that, made its decision granting the motion for summary judgment.

The third thing that the Supreme Court did was to reject, as erroneous, certain of the findings of fact heretofore made by this court, and as to which further evidence was rejected by this court upon the theory that those facts, and the issues presented by those findings were not material to the decision that this court was making.

Now, so far as the classification of action by the Supreme Court, statements made by the court, with reference to the law applicable to plurality of license agreements with the price-fixing provisions, most of those statements have been made, have been referred to in the course of the argument today, but one has not, and that is that statement of the court beginning at page 23 of the slip opinion, or page 389 [fol. 445] of 333 U. S., beginning with the words "We think that the industry-wire license agreements entered into with knowledge on the part of licensor and licensees of the adherence of others with the control over prices and methods of distribution through the agreements and the bulletins

were sufficient to establish a prima facie case of conspiracy."

Chief Judge Stephens: Where is that language? I am sorry, I don't find it in the slip opinion.

Mr. Connelly: That is page 23 of the slip opinion.

Chief Judge Stephens: Oh,—page 23 of the slip opinion.

Mr. Connelly: Beginning about 7 lines down.

Chief Judge Stephens: I see it.

Mr. Connelly: I am sorry I didn't make that clear.

And then, following that general statement is a reference to the awareness by the licensees of the intentions of the parties, the provisions of the license agreement, royalty provisions, and the bulletins; and then, the court continues at the bottom of page 23:

> "The District Court did not accept the foregoing facts as definite evidence of a conspiracy. To us, these facts are proof of a conspiracy. Certainly they are overwhelming evidence of a plan of the licensor and licensees to fix the prices and regulate operations in the gypsum board industry."

And, I emphasize the word "board" advisedly.

[fol. 446] The second reference along that line, in the Supreme Court opinion, appears at page 27 of the slip opinion, page 393 of 333 U. S. That is about the middle of the page of the slip opinion:

> "The license agreements and the bulletins establish the conspiracy of the licensor and each licensee to violate the Sherman Act."

Then next, on pages 34 and 35 of the slip opinion, 400 and 401 of 333 U. S., appears the language which has been several times today adverted to, beginning: "The General Electric case affords no cloak for the course of conduct revealed in the voluminous records, et cetera."

Now, those excerpts or provisions of the Supreme Court opinion seem to me to make entirely clear the limits of the court's statements on the basis of which this court was asked to and did grant the motion for summary judgment.

The defendant United States Gypsum Company, of course, opposed that motion and took a different position

as to the import and meaning of the Supreme Court opinion, but that has been determined by the decision of this court and we are now concerned solely with attempting to isolate and turn to those portions of the Supreme Court opinion on the basis of which a motion for summary judgment could have been granted on the concededly, admitted facts; and each one of those references in the opinion makes it entirely clear that what the court was there talking about, [fol. 447] and was there distinguishing from the General Electric case, was the issuance of patent license agreements throughout an entire industry, patent license agreements containing price provisions, and the adherence to those price provisions by each of the defendants with knowledge of the adherence of others.

Those were the facts which have been admitted by the defendants, on the basis of which a motion for summary judgment could be granted.

The only other aspect of the Supreme Court decision which might possibly have a bearing here is the statement, or statements to which I have referred, in which the Supreme Court rejected findings of fact made by this court. In other words, statements by the Supreme Court applicable not to the conceded facts, but applicable to the facts in dispute among the parties.

The Supreme Court rejected the findings of this court in four, and only four respects.

One. The findings of this court that defendants had not associated themselves in a plan to blanket the industry under patent licenses and stabilized prices. That is finding 118, which has been mentioned.

Two. The findings of this court that there was not any agreement among the defendants to eliminate the production of open-edge board. Those findings were rejected by the Supreme Court.

[fol. 448] Three. The findings of this court that the license agreements were not executed with the intent of eliminating jobbers, and the other subsidiary findings bearing upon that general finding.

Fourth, the findings of this court that there was not any understanding or agreement among the defendants that

prices would be raised or fixed upon plaster or any unpatented product, and the subsidiary findings relating to that.

Now, those are the four respects in which the findings of this court were disturbed by the Supreme Court, in its opinion. In all other respects, while the court recited evidence with reference to this subject, and the other subjects, as evidence offered by the Government to prove some fact, or as evidence having a tendency to prove some fact, they nevertheless refrained from any rejection of a finding themselves, and left that for such disposition as this court should make of it in further proceedings thereafter.

Now if, in the further proceedings contemplated by the Supreme Court, the defendants had appeared here and had rested their case without introducing any evidence, or without offering to introduce any evidence, it still, I take it, would not be incumbent upon this court to find the facts otherwise than they had previously found them, even as to the four respects in which the Supreme Court rejected the findings of this court.

To be sure, this court would not then be free to find all [fol. 449] over again the precise facts as found, as rejected by the Supreme Court; but nevertheless, as I understand the law, this court is always under an obligation to make its own determination as to the facts and is not required to find the facts otherwise than it has found them, merely because the Supreme Court has reversed on that finding and in that connection, although that situation is not here presented, it nevertheless I think has an application.

Your Honors may be interested in looking again perhaps at the case of Hartford-Empire Company against the Shawkee Manufacturing Company, a decision by the Third Circuit Court of Appeals in 1944, reported at 147 Fed. 2nd, 532.

In that case, which was a patent infringement case——

Chief Judge Stephens: 532?

Mr. Connelly: 532, yes, sir.

In that case, a patent infringement case, judgment had been rendered for the plaintiff by the District Court, and by the Circuit Court of Appeals. When the case got to the

Supreme Court, the judgment of the lower court was reversed upon the ground that, the Supreme Court held, the plaintiff had not come into court with clean hands. The basis of that conclusion by the Supreme Court had to do with certain of the alleged frauds charged in the Hartford-Empire case, the Government's case against Hartford-Empire Company which was referred to earlier today.

[fol. 450] Judge Garrett: Pardon me. You used an expression awhile ago, the full significance of which I did not get. Perhaps I may not have correctly understood the expression. The purport of it seemed to be that if this court should have granted a hearing upon these different questions upon which the Supreme Court did not pass, in our view, that we then might have reconsidered the question, I mean, the determination of the Supreme Court with respect to those questions upon which they did pass.

Mr. Connelly: No, sir. I perhaps did not make myself clear. I did not mean to convey that impression.

Judge Garrett: Perhaps I misunderstood you.

Mr. Connelly: I was addressing my remarks there solely to the necessity of making findings of fact incorporating the views expressed by the Supreme Court, on the evidence which it did discuss; and, I was referring in that connection, to this case of the Hartford-Empire Company against Shawkee, where that precise situation was presented; and, to say the Supreme Court reversed the lower court and directed the entry of a judgment dismissing the complaint.

The District Court carried out that direction and entered a judgment dismissing the complaint. One of the parties applied to the Circuit Court of Appeals for an amendment of its mandate so as to direct the District Court to make the findings of fact specific, covering the factual situation which had led the Supreme Court to reverse; and in refusing to [fol. 451] amend its mandate in that respect, the Circuit Court of Appeals pointed out, after saying:

> "We think it is clear that what the defendants really want is a mandate from us directing the District Court to make such findings at once, in advance of the submission to the court of any evidence upon which the findings might be based."

And then, I don't propose to read all of that, but just a portion of it:

> "A finding of fact is not the goal of the judicial process, nor is it the relief which a court of justice accords a litigant. On the contrary, it is merely an intermediate step in the judicial process of deciding a controversy. Its office is to distill from the evidence which has been adduced at the trial of the disputed issue, the pertinent facts which must be known by the court in order to enable it to determine and apply the relevant rules of law and thereupon, to grant appropriate relief to the litigants. Findings of fact are not to be made in a vacuum, but only in connection with an issue of fact which is before the court for adjudication, and after the evidence bearing upon that issue has been received and considered by the fact finders (citing cases). For us to direct the District Court, in advance of its having heard the defense of the defendant's pending counter-[fol. 452] claims, to make the fact findings which they seek, would be to compel the court to pre-judge crucial fact questions in the case, a procedure which is abhorrent to the concept of fairness involved in due process of law."

Now that statement, from the Third Circuit Court of Appeals, I regard as applicable to the situation here, in that with reference to these four respects in which the Supreme Court rejected the prior findings of this court, upon the motion of summary judgment, the defendants made specific offers of proof.

[fol. 453] Offers of proof were made with reference to the alleged plan to blanket the industry. That is Offer No. 1.

Offers of proof were made with reference to the claimed agreement to eliminate the production of open-edge board. That appears in offers Nos. 46 and 54.

Offers of proof were made with respect to the claimed agreement to eliminate jobbers. That appears in offers 56 and 57.

Fourthly, offers of proof were made with reference to the alleged agreement to fix prices on plaster, paragraphs 58 and 59 of the offer of proof.

So that all of those matters, all of those areas in respect to which the Supreme Court disturbed the findings made by this court, were the subject of offers, by the defendant, to introduce additional evidence in support of the defendant's contentions.

Clearly, the rejection of those offers to prove does not place this court in a position to decide those disputed questions of fact now, on the present state of the record, in a manner contrary to that which the defendants have offered to prove.

The motion for summary judgment, under Rule 56, predicates the claim for relief squarely upon the proposition that there is no genuine issue of fact, or no genuine issue as to any fact material to the judgment sought. On such a [fol. 454] motion, it is certainly abundantly clear that the court may not there, and then, decide disputed questions of fact; and, the court may disregard facts as to which there is an issue only to the extent that the court regards those facts as immaterial, not material to the relief then being granted.

The only material facts then before the court as to which there was no genuine issue, were, first, that the patent licenses were executed; secondly, that they had price fixing provisions; thirdly, that such provisions, including the price bulletins issued thereunder, were adhered to with knowledge of the adherence by others; and on all other matters, there were genuine issues created, not only by the pleadings, or created by the evidence already in the record, and created also by the defendants' offer of proof.

It is our view, therefore, that on the case as it now stands, that the court is not in a position properly to decide against the defendants on the various issues as to which there was a genuine issue of fact; and that the decree which may properly be entered at this stage, must be one which is based upon those material facts as to which there was not any genuine issue.

Now, with that introductory comment to the consideration of the proposed findings, conclusions and decree, first with reference to the necessity of findings or conclusions: Rule 52(a) provides specifically that findings of fact and [fol. 455] conclusions of law are unnecessary on decisions of motions under Rule 56. The words of the rule are specific on that and there cannot be room for controversy.

Of course we recognize that that provision does not prevent the court from making findings of fact and conclusions of law if it deems them desirable.

The question whether, in any given case, findings of fact and conclusions of law should be made on a motion for summary judgment, notwithstanding the fact that it is not necessary to make such a finding, is a difficult one to determine in a vacuum. I mean by that: There are some decrees which clearly would require some indication by the court of just what it had found; just what it had concluded, in order that *if* the decree might properly be understood.

The provisions, for example, of the decree proposed by the plaintiff containing, as it does in so many respects, injunctive provisions going beyond what we have thus far conceived to be the issues in the case, might well require a statement of the precise facts found by the court, and conclusions made in order to justify those injunctive provisions. If, however, the decree is clear on its face as to just what is found, then it is our position that there is not only no necessity, but that there is not any occasion for the court to make any specific findings of fact and conclusions of law.

We have annexed to our memorandum, as Exhibit B, a [fol. 456] set of findings of fact and conclusions of law which we are not here proposing as being findings of fact and conclusions that we urge the court to make, but merely setting forth our views as to what might properly be found, and concluded, if the court should decide that some findings and some conclusions were necessary.

Those proposed findings consist of 25 numbered paragraphs, the first 22 of which are taken verbatim from corresponding paragraphs of this court's prior findings. In other words, those are questions on which the court has already passed. They are questions on which this court's decision was not disturbed in any respect by the Supreme Court.

Judge Garrett: You wouldn't think it would be proper to repeat that, would you, in a decree?

Mr. Connelly: No, not in a decree, sir; but so far as findings of fact are concerned, yes.

Judge Garrett: Oh, in findings of fact.

Mr. Connelly: Yes, sir, and the concluding paragraphs 23, 24, and 25 are merely additional findings designed to

cover what we understand the court has added, the additional ground, so to speak, covered by this court in granting the motion for summary judgment.

Then, there are three relatively simple conclusions of law which, as we conceive it, would adequately cover the situation.

Judge Garrett: May I interrupt?

[fol. 457] Mr. Connelly: Yes, sir.

Judge Garrett: May I ask you: I have this before me (indicating document). Do you have that before you?

Mr. Connelly: Yes.

Judge Garrett: Will you turn to page 19 of that, the last paragraph, just before Section 7? This sentence has puzzled me:

> "Their rights should be recognized in the decree by giving the licensees the right to take a non-exclusive license to make, use and sell patented gypsum plasterboard lath and wallboard, embodying the inventions of the same patents under which they are now licensed at reasonable royalties to be agreed upon between the parties."

Would you be good enough to explain that to me, what you meant by that?

Mr. Connelly: I shall endeavor to.

In this situation, the patents which are in question here are the patents of the United States Gypsum Company. Now, licenses were issued under those patents to the other defendants in the case, in order to permit those other defendants to manufacture the patented gypsum board. All of those license agreements were, as we have pointed out, entered into in good faith by the United States Gypsum Company as licensor, and by the other defendants as licensees in the [fol. 458] belief that the provisions of those license agreements were authorized by the Supreme Court decision in the General Electric case, and that a belief that was shared by this court, itself, upon the initial trial.

Now, the Supreme Court has held that certain provisions of those patent license agreements are invalid, that is to say, the price fixing provisions. The effect of the Supreme Court's determination, as interpreted by this court in granting the motion for summary judgment, is going to be

to strike down those license agreements. That, then, will leave the other defendants without the protection of a patent license. Those other defendants have invested funds in the construction of manufacturing facilities on the strength of and in reliance upon their right under the license agreement, to continue to manufacture products embodying inventions covered by U.S.G. patents; and, it was merely in the belief that it would be inequitable for the United States Gypsum Company, or for those licensees, I should put it the other way around,—for those licensees to be deprived of their right under the license agreement, their right to manufacture, merely because of a decision holding unlawful, conduct which all the parties to the license agreement had theretofore regarded as lawful.

Therefore we proposed that in the decree should be a provision, and I will cover that specifically when we get to that part of the decree—a provision under which the licensee defendants would continue to have the right to make, use [fol. 459] and sell patented products, the same rights that they may have, but under license agreements without the price fixing provisions which have been condemned by the Supreme Court.

Does that answer Your Honor's question?

Judge Garrett: I think that does, yes.

Chief Judge Stephens: While you are at that point, you might comment upon the contention of the Government that under the Hartford-Empire case, that a non-exclusive license agreement should be given to any applicant, not only just the licensee defendants.

Mr. Connelly: That is one of the provisions in the Government's decree which we regard as most objectionable.

I might say, parenthetically, with reference to that provision: Counsel for the plaintiff states, as if it were a fact of some significance, that none of the other defendants object to Section 6 of their proposed decree.

Well, of course they don't, because Section 6 of the proposed decree relates solely to the defendant United States Gypsum Company and would purport to require United States Gypsum Company to grant licenses to any applicant therefor.

The several subparagraphs under that license provide rather elaborate machinery under which any question as to

the amount of royalty would be determined by this court, and so forth.

Now, it is perfectly true that some decrees in some situa-
[fol. 460] tions have directed compulsory licensing under patents, but it is a most extreme and drastic remedy, because the effect of it is to take away, in part at least, the property right of the owner of the patent.

Now, the only situations which counsel for the Government has referred to in which such compulsory licensing provisions have been included in the decrees are—first, the Hartford-Empire case. Well, certainly, that was a most extreme situation in which the power of the conspiracy had been obtained by aggregating patents belonging to the several members of the conspiracy, placing them together in a patent pool. Your Honors will recall the various cross-licensing arrangements between Hartford-Empire Company, on the one hand, and Owens-Illinois, Hazel Atlas, and others, and vesting in the Hartford-Empire Company, as a licensing agency the sole power to license others under any of these competing patents in the pool.

[fol. 461] That was the situation which, in a true monopoly sense, there had been acquired by a combination, the power to exclude others from the industry.

Judge Jackson: Well, would that, in its final analysis, be any different?

Mr. Connelly: Yes, sir.

Judge Jackson: I am just wondering why?

Mr. Connelly: It is different in this sense——

Judge Jackson: U. S. Gypsum has the reins. It has the control. Whether it got them by purchase or by original application, or, as in the Hartford-Empire case, Hartford-Empire had it, so when you have Gypsum on the one hand exercises the power of fiat and veto, and Hartford-Empire on the other, regardless of how they got it, has the same power, what is the difference there?

Mr. Connelly: I think the fundamental difference lies in the manner in which the patents are acquired.

On the one hand, United States Gypsum Company, holding the patents, has a property right to exclude others. That is a perfectly lawful right, and its acquisition was lawful.

In the Hartford-Empire case, the acquisition of the power was not by any lawful means, but was by virtue of the very combination and the conspiracy which was stricken down as illegal. That is, I think, a significant point of difference between the two cases; and there is, of course, the additional [fol. 462] fact, and that is that in the Hartford-Empire case there had been an abundant evidence of the intention of Hartford-Empire Company, acting, in a sense, as the agent for the pool to exclude others in the industry and to prevent them from obtaining or to refuse to grant licenses; whereas in this situation, we do not have any evidence of any refusal on the part of United States Gypsum Company to grant licenses to others.

Judge Jackson: How about the Cardiff matter?

Mr. Connelly: The Cardiff did not involve any question of a license under patents.

I don't want to avoid any part of your question.

Judge Jackson: Don't let me interfere with the thread of your argument.

Mr. Connelly: Now, after all, this is a decree by a court of equity, and the provisions of a decree should fit the particular fact situation with which the court is dealing. In some cases, of course, rather drastic provisions may be required in order to correct wrongs which have existed in the past. In other cases where the same wrongs have not existed, a completely different kind of relief would be appropriate.

The Hartford-Empire case is one of the most extreme cases, so far as conspiratorial action, not, I take it, to be confused with the situation such as we have here, where everything that the parties did was done in the belief that it was a perfectly lawful exercise of patent rights.

[fol. 463] The two other cases, going back to Your Honor's question—the two other cases which the Government referred to as having been compulsory license provision cases, one, the National Lead case; and, two, the Line Material case—so far as the National Lead case is concerned, again you had a cross-licensing arrangement between the National Lead Company, and DuPont.

When that case got to the Supreme Court on appeal from that decree, there wasn't any issue made as to the propriety of reasonable royalty, compulsory licensing. In other

words, no one raised that question before the Supreme Court. The question decided by the Supreme Court in that respect was merely whether there should be royalty-free, compulsory licenses, or reasonable royalties for compulsory licenses.

[fol. 464] As far as the Line Material case is concerned, counsel for the Government pointed to the provision on compulsory licensing there contained, and called your Honors' attention to the fact that this decree was entered after argument.

It is quite true that this decree was entered after argument. I participated in the argument with reference to that decree. I did not, however, represent in that case, the patentee, I represented one of the licensees; and the compulsory licensing provision requested by the Government, and therein incorporated in the decree, was not opposed by the patentee in that case. Whatever reasons the patentee may there have had are not known to me and are not, perhaps, of interest in this proceeding. In any event, that did not involve any contest between the Government and a patentee concerning the propriety of the compulsory licensing provision in that case.

There is such contest here, and the defendant United States Gypsum Company objects very strenuously to that provision of the Government's proposed decree.

Have I answered Your Honor's question in that respect?

Now, I have been discussing the question with reference to the findings of fact and conclusions of law. The Government's proposed findings and conclusions are, as Your Honors have already ascertained, extremely voluminous. They involve some 165 findings, and some 17 conclusions. Obviously, it would be impracticable, as well as lacking in [fol. 465] utility, to undertake any detailed discussion of each of those findings, or even groups of those findings. I should like merely to make certain general observations with reference to them, and that is, that in almost every case they are in the form of argumentative statements of evidentiary facts, a statement of evidence, or selected portion of the evidence designed to create an inference of some wrong doing, as the result of the manner in which they are phrased.

Secondly, in almost their entirety, those proposed findings are wholly outside the scope of what we understand this court decided on the motion for summary judgment. They deal, not with what we have described as a combination by plurality of licenses, they deal with the charge made in the complaint of an over-all plan or scheme to fix prices, using the license agreement to disguise their illegal purposes.

Thirdly, in many respects, which we have pointed out in our memorandum, the proposed findings are inconsistent and are in conflict with findings of fact heretofore made by this court upon the same record.

Now clearly, certainly as to any findings as to which the Supreme Court did not reject the prior findings of this court, it is an absurdity, I take it, to ask this court now to reverse its trial findings upon the same evidence that it previously had before.

Fourthly, in many, if not most respects, the proposed [fol. 466] findings submitted by the Government include facts in dispute, facts as to which the defendants have made offers of proof, and as to which this court has declined to review further evidence.

And, fifth, they are in many respects based upon hearsay statements contained in the declarations which, as Your Honors will have in mind, the Supreme Court held admissible in evidence, but as to which the defendants have, by reason of this Court's decision on the motion for summary judgment, been denied any opportunity of presenting evidence in explanation, and therefore we submit it would be wholly improper at this time, in the absence of that explanation, in the absence of the opportunity to make that explanation, to base findings of fact on such evidence, even though out of the Supreme Court's decision, this court can properly regard those hearsay declarations as being admissible in evidence by reason of what the Supreme Court defined as the prima facie case of conspiracy.

Each of those, as I say, each of those proposed findings have been dealt with in our memorandum, and the only one which I think deserves any comment here is that with reference to the Cardiff Gypsum Company, which Judge Jackson referred to a moment ago, because it was singled out

for discussion by counsel for the Government in his oral argument.

Those proposed findings by the Government, 115 to 119, relating to the Cardiff Gypsum Company, are dealt with in [fol. 467] our memorandum at page 56.

I should like to make just two brief comments with reference to that.

First, the court called counsel's attention to this fact that the testimony of Mr. Sensibar, referred to in support of the proposed findings, was received in evidence, but it was received in evidence for the limited purpose of its bearing upon the charge of fixing prices of plaster. It was not received with reference to any claim of exclusion from the market, and indeed there was not in the complaint any such charge of exclusion of purchases from the market.

Notwithstanding the limited character, the limited nature of the receipt of evidence in that testimony, the proposed finding deals not with plaster prices, but, as indicated in proposed Finding 119, "The defendants have excluded the Cardiff from the board market and this exclusion constitutes an undue and unreasonable restraint and monopolization of trade."

[fol. 468] Secondly, counsel also stated that there was nothing in defendant's proffer of proof relating to the Sensibar testimony. The fact is that the offer of proof contains two paragraphs, 58 and 59, dealing specifically with the issue relating to plaster prices, the only issue on which Mr. Sensibar's testimony was received.

Apart from those two comments, I think the balance of the position of the defendants with reference to those proposed findings are dealt with in the portion of the memorandum to which I have referred Your Honor's attention.

Chief Judge Stephens: What paragraph of your offer did you refer to, paragraphs 52 and 53?

Mr. Connelly: 58 and 59.

Chief Judge Stephens: 58 and 59?

Mr. Connelly: Dealing with the offer to prove with respect to the absence of an agreement to fix prices on plaster.

Now, I should like to take up, with the court's permission, the question of the form of the decree to be entered here.

In our consideration of the form of the decree proposed by the Government, it has seemed to us that if the provisions

go so far beyond the scope of what we understand was decided upon the motion for summary judgment, that rather than to attempt to deal with each specific provision of the Government's proposed decree, in a negative fashion, that it might be more helpful to the court to set before it a form [fol. 469] of decree, not in the sense of that decree being proposed by the defendants, of course, but a form of decree which we would regard as a proper and an approriate form under the court's decision, as we have understood it. That form of decree is set forth as Exhibit A, to our memorandum, beginning at page 81 and continuing to page 85.

In discussing the specific provisions of the Government's proposed decree, it might be helpful to the court to have before it, in connection with that discussion, the specific provisions of the form of decree annexed to our memorandum which should correspond thereto, and we have therefore prepared for the convenience of the court, a schedule setting forth, in two columns, the excerpt of portions of plaintiff's proposed decree, and the form of decree attached to our memorandum.

May I have Your Honors' permission to hand copies of those schedules to the court?

Chief Judge Stephens: Mr. Marshal, will you help counsel to distribute them please.

(A paper writing entitled the "Comparison of Decree Proposed by U. S. with Form of Decree Submitted by U.S.G." was distributed to counsel and the court.)

Chief Judge Stephens: Proceed.

Mr. Connelly: The only portions of the two forms of decree which are not included on the schedule are the respective preambles, that is, prior to section 1. The differ- [fol. 470] ences between the two forms of preamble are largely self-explanatory and largely formal, except for the fact that in the Government's proposed decree, in that preamble there is a recitation of a finding of Sherman Act violation which is completely undefined and without limitation; and that in the form of decree annexed to our memorandum, we have attempted to define and make precise, that is to say: "The court having found that under the aforesaid opinion of the Supreme Court, as construed by it, the defendants by adhering to the minimum price pro-

vision, patent license agreements in an entire industry, with knowledge of the adherence thereto of the others, thereby acted in concert to restrain trade and commerce among the several states in the Eastern Territory of the United States."

And secondly, the statement in the preamble of the Government-proposed decree that there is no genuine issue as to any material fact. In the context in which that statement appears, it seems to us that that goes far beyond the scope of the court's determination, and we have therefore suggested its limitation at the top of page 82 by the provision that: "There is no genuine issue as to any fact material to that finding." That is to say, the finding as to law violation previously defined precisely.

Turning now to the schedule of the two forms of decree, section 1, of course, is purely formal. There is no difference between the two forms of decree in that respect.

[fol. 471] Now, the definitions do present several serious questions. Because definitions are not particularly significant in the abstract, it would seem to me desirable to take up those definitions as the terms defined are first used in the body of the decree, so that the court will be in a position to determine just what differences are effected by the difference in the definition.

Article 3 of the Government's proposed decree is this broad finding of conspiracy to restrain trade and monopolize trade, without any limitation, without any definitions or restrictions. In order words, it is almost the language of the Sherman Act, and we think that goes again, far beyond any determination made, or that should be made by this court.

Now, in that Article 3 appears the term "gypsum products." The defendants have "contracted, combined and conspired to restrain trade and commerce in gypsum products." That takes us back to the definition.

> "Gypsum products shall mean those products used primarily in the building construction industry made from gypsum, including but not limited to, plaster, plasterboard, lath, wallboard (the latter three may be ordinary, perforated or metalized), special surfaced gypsum board, sheathing, liner board, block, tile, and Keene's cement."

In other words, by that definition of gypsum board, and [fol. 472] by using the term "gypsum products" in Article 3, and indeed elsewhere throughout the decree, the Government has made the decree, and the injunctive provisions apply far byond any combination in restraint of trade of gypsum board, but has extended it to include a restraint of trade in all kinds of gypsum products, indeed, even those beyond the specification in the bill of particulars as to what was meant by "gypsum products" in the complaint.

To that extent, then, it goes beyond the scope of the determination made here.

Next, in that same provision of the decree, finding of a combination and conspiracy is not limited territorially, although the charge in the complaint was a combination and conspiracy to restrain trade in the eastern territory of the United States.

And lastly, it contains a finding with reference to monopolization under Section 2 of the Sherman Act.

Now, monopolization, the attempt to conspire to monopolize, under Section 2 is an offense which is something different from the offense under Section 1 of the Sherman Act, a combination to restrain trade.

Judge Garrett: Did the Supreme Court make any distinction, in this decision, between those two sections?

Mr. Connelly: No, sir, at least as I read the opinion, it did not deal with the question of monopoly as distinguished from combination in restraint of trade; but, it was not, [fol. 473] perhaps, before the court for decision in its opinion and decision in this case.

It is now, I take it, before this court; and, it is before this court by reason of the Government's request that the decree include a finding of violation of Section 2, as well as violation of Section 1.

Chief Judge Stephens: We will adjourn this afternoon at 5:30.

You may proceed to occupy another half an hour, then.

Mr. Connelly: I think I can state our position with reference to that question briefly, that Section 2 question, and again we have dealt with it in our memorandum.

First, as the Supreme Court has pointed out in the American Tobacco case, 328 U.S., page 788, "Sections 1 and 2 of the Sherman Act require proof of conspiracy which are re-

ciprocally distinguishable from and independent of each other, and although the objects of the conspiracy may partially overlap."

Secondly, the definition in that statement in that same case, the American Tobacco Company case, as to what was meant by the term "monopolize" as used under Section 2 of the Sherman Act,—the court approved a charge to the jury which read, in part:

> "The joint acquisition or maintenance by the members of a conspiracy formed for that purpose, of the power to control and dominate interstate trade and [fol. 474] commerce in a commodity to such an extent as they are able, as a group to exclude full or potential competitors from the field, accompanied by the intention and purpose to exercise that power."

[fol. 475] That charge to the jury, as I say, was specifically approved by the Supreme Court, which went on to say at page 809:

> "A correct interpretation of the statute, and of the authorities makes it a crime of monopolizing, under Section 2 of the Sherman Act, for parties in these cases to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce of the several states or foreign nations, provided they also have such a power that they are able, as a group, to exclude actual or potential competition from the field, and provided that they have the intent and purpose to exercise that power."

Now, it is on those grounds, recited a moment ago, that distinguish the situation that exists here with reference to the U.S.G. patents. Of course, the ownership of those patents gives the power to exclude. That is, by definition, what a patent consists of; but that power to exclude is something different from the power to exclude referred to in the cases as constituting a violation of Section 2 of the Act, the power to exclude as a group, a power acquired by combination or conspiracy.

Now, it is quite possible, and I think in answer to Judge Garrett's comment a moment ago as to whether the Su-

preme Court said or did not say anything with reference to distinguishing between the two concepts of this case—it [fol. 476] would be quite possible, conceivably, let us put it that way, that any trial on the basis of which all of the Government's charges in the complaint were sustained by evidence in the case—of course it would be possible to find both a violation of Section 1, a combination and conspiracy to restrain; and, something different, that something different being the attempt to monopolize or conspiracy to monopolize under Section 2. But, because of the disposition actually made of the case by this court, in other words the granting of a motion for summary judgment on the theory that the admitted facts with reference to the plurality of licenses justified the granting of the motion, it is our position that nothing more was determined which would authorize a finding of violation of Section 2 of the Sherman Act.

By contrast, in our proposed Article 3, which is set down in the second column of the schedule, we have attempted to define what we understand this court's decision to be as to the nature of the law violation. The defendant companies, by adhering to the minimum price provisions of the patent licenses in an entire industry, with knowledge of the adherence thereto of the others, acted in concert in restraint of trade and commerce among the several states in the Eastern Territory of the United States to fix, maintain and control the prices of gypsum board, in violation of Section 1 of the Sherman Anti-Trust Act.

Now, there are three definitions that come into play there. [fol. 477] Judge Garrett: May I interrupt again?

Mr. Connelly: Yes, sir.

Judge Garrett: You said, what this court undertook to define, or did define—you mean in that summary judgment action, or—it's the Supreme Court that did this, not this court.

Mr. Connelly: But, following the Supreme Court's action, then this court granted——

Judge Garrett: You mean, it interpreted the Supreme Court's decision?

Mr. Connelly: It interpreted its decision and granted the motion for summary judgment.

I meant to point out only that in so doing, this court, as we have understood it, did not go beyond the questions

determined by the Supreme Court, and did not undertake to decide all of these disputed questions of fact embraced within the charges of the complaint; but, not determined—as to which the law was not determined in the Supreme Court decision.

Now, as used in that Article 3 in our form of decree, the definition of minimum price provisions is of some importance. That is defined in Article 2, paragraph 4, it appears at the top of the same page as the schedule, on page 2:

> "'Minimum price provisions' shall mean and include: (a) Any provision contained in a patent license agreement constituting an agreement, reservation of [fol. 478] right, or license limitation with respect to the price or other terms or conditions of sale of gypsum board; and (b) any price bulletin or other notice or communication issued pursuant to any such provision."

In other words, it is our intention, in that definition, to define minimum price provisions in the broadest possible way so that the decree entered by the court would strike down entirely every feature of it that might be regarded as coming within the Supreme Court's opinion, as interpreted by Your Honors.

The term "patent licenses" is also defined in the preceding article, that being paragraph 5 of Article 2, as those: "Which were in effect between the defendant United States Gypsum Company and each of the other defendant companies at the time the complaint herein was filed and prescribed in said complaint."

And then, we go on to list the various patent licenses that were in effect at the time the complaint was filed in this action.

[fol. 479] Now, with reference to that list of patent license agreements, counsel for plaintiff has stated here that it is entirely agreeable to him that that list of licensees be incorporated provided that it can be certified that those are the only agreements in effect between the parties.

In attempting to deal with that situation specifically, we think that to avoid any possibility that there may be some amendments or supplements to those agreements which thus far have not come to our attention in connection with it,

at the end of Article II of the form of decree attached to the defendants' memorandum these words might be added: "And any supplement"—that is at page 84 of our memorandum.

Chief Judge Stephens: Where would that go?

Mr. Connelly: At the very end of Article II.

Chief Judge Stephens: Article II, at the top of page 84?

Mr. Connelly: Yes, sir, at the top of page 84, just after the list of licensees.

Chief Judge Stephens: I see.

Mr. Connelly: "And any supplement or amendment to any of said patent licensee agreements." With that addition, the list is obviously all-inclusive, and the certification requested may properly be made.

Chief Judge Stephens: "And any supplement or amendment"——

Mr. Connelly: "And any supplement or amendment to any [fol. 480] of said patent license agreements."

One other definition involved in Article III is the definition of "gypsum board". That is defined in Article II, paragraph 3, as meaning "plaster board or lath (including perforated and metallized lath) and wallboard (including metallized wallboard) made from gypsum and embodying any of the inventions or improvements set forth and claimed in any of the patents."

That finding of combination and conspiracy in the form of decree which we have annexed to our memorandum is consciously limited to a conspiracy to fix, maintain and control the prices of gypsum board. It is so limited because that is a situation which the Supreme Court was dealing with and which this court was dealing with on the motion for summary judgment, that is to say, the combination by plurality of license agreements to fix the prices of the patented board licensed by the agreement itself.

Now, one statement was made today in oral argument by counsel for the plaintiff to the effect that, as I recall it, there is no evidence in the record that any of the board actually made by the defendants actually embodied inventions covered by the patents.

Well, of course, that is inverting the problem, I should think, because the issue, as it developed in this case, and one of the principal issues, shall we say, was whether these

[fol. 481] license agreements were bona fide license agreements designed to permit the licensees to manufacture infringing products or whether those license agreements were merely entered into as a sham to disguise price fixing.

That view of the situation was indicated by this court in its finding 55, in which it was stated:

> "No evidence has been introduced proving, or tending to prove, that the board made and sold by the defendants was not made under the patents on which the license agreements were based."

In addition to that, there are two other specific findings relating to the question. Finding 36:

> "The companies which became licensees did so because they desired to settle or avoid litigation, and to obtain the right to use U.S.G.'s patents, considering it a business necessity to be able to do so. Several of the licensees had made the closed-edge board before they acquired the right to do so from U.S.G., for which infringement of the Utzman patents they paid substantial damages. Also some of the licensees had manufactured board containing starch which was covered by the Haggerty patent. Numerous other patents included in the licenses were essential to the manufacturing of modern gypsum board."

That is finding 36 which was just read in full and was not disturbed in any respect by the Supreme Court in its de-[fol. 482] cision.

And finding of fact 74 deals in part with the same situation.

I will read just a portion of it:

> "The primary purpose of U.S.G. in granting the licenses was the settlement of litigation, the collection of damages for infringement, the obtaining of royalties, the fixing of a profitable price on the patented board, and the securing of the various advantages which would normally flow from the general manufacture and sale of the superior product. The primary purpose of the licensees in the signing of the licenses was the obtaining

> of the right to make the superior product, and the settlement or avoidance of litigation."

And that finding, likewise, was not disturbed in any respect by the Supreme Court.

So, I think that we may properly contend that the decree in this case, both as to the finding of law violation and as to its injunctive provisions, should deal only with the gypsum board which was the subject of the patent license agreements, and the subject of the price fixing under those patent license agreements.

Next, Article IV of the Government's proposed decree:

> "That the provisions of this decree applicable to any defendant shall apply to such defendant and to each of its officers, directors, agents, attorneys, servants and employees," and so forth.

[fol. 483] We have two questions with reference to that language. First, the applicability of this decree to individual defendants.

The individual defendants were not, in any sense, parties to the license agreements themselves. To be sure, as officers, representatives of their companies, they were active in the execution of the documents themselves. There is nothing in the combination by plurality of licenses that indicates any action on the part of the individuals, as such. Their only conduct was as officers, directors, or agents of the companies that they represented, and, consequently, it is our view that an injunctive decree, operating against those companies and their officers, directors, agents and representatives, whoever they may be, will of course cover those individuals so long as they continue in their capacity and will cover any other individuals who may replace them in that capacity. There is no place in the record, as we see it, for including injunctive provisions against the individuals, apart from their acts in their capacity as officers or agents of the companies.

The question raised by counsel for the Government with reference to Samuel Gloyd, we have dealt with by using the term "defendant companies" and "enjoin"—We have defined that term in Article II, subparagraph 1, " 'Defendant companies' shall mean all the corporate defendants and

Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company."

Chief Judge Stephens: Where is that? Oh, I see it; all [fol. 484] right.

Mr. Connelly: Now, the second provision of that section IV, your Honors, has already raised one question that was in our minds, which was the use of the word "attorneys." I take it that has been disposed of.

The additional provision of that paragraph is the use of the term "successors and assigns," simply because of the ambiguity and uncertainty attaching to that term.

Now, as we know, a decree of this kind is not automatically terminated at any dated. It continues in existence and perpetuity and there is no occasion on the facts of this case, as we see it, to talk at all about the possible effect of decree upon persons who are not parties to it.

As your Honors will note, we have, in effect, in our Article V, by the introductory language, attempted to take care of both the Government's proposed section 4 and the introduction to section 5, by use of the words "Each of the defendant companies and each of their respective officers," and so forth, "are hereby enjoined and restrained from:"—

The introductory portion of Article V of the Government's proposed decree contains several features which again introduce ambiguity, uncertainty, and we believe the possibility of going beyond the scope of this determination.

In the first sentence, the reference to "gypsum products" is not limited to "gypsum board," but the reference is to [fol. 485] defendants' activities in connection with the distribution of gypsum products.

Secondly, the term "planned common course of action" —a completely vague and uncertain term. To be sure, it has been used by the Federal Trade Commission in certain situations, but if such a term is ever proper and appropriate, it would be appropriate in a case of the vague and broad conspiracy to restrain trade and not appropriate to a case such as here, where the decision of law violation is predicated upon precise conduct, that precise conduct being the entering into and performance of these patent license agreements with price-fixing provisions.

Judge Garrett: Mr. Connelly, if I remember right, and if I am in error in this, please correct me, he stated in his

argument that there was no showing in this entire record that the manufacturer, under these licenses, was limited to the patented article. Is that correct?

Mr. Knuff: I think what your Honor has in mind is that I stated that there was no evidence in this record that any board was ever made under any of these patents.

Mr. Connelly: It was with reference to that statement that I referred your Honors, a few moments ago, to a certain finding of fact bearing on that question. Now, under section V of the Government's proposed decree are ten separately numbered subparagraphs. In general, I take it they are intended to deal with the question of fixing of prices and terms and conditions of sale. To the extent that they are [fol. 486] within the scope of the combination and conspiracy found here by the court on motion, I take it that they would be fully covered by the provision, paragraph 3, of the same article of our form of decree, which reads, after the preliminary introduction, "Each of the defendant companies and each of their respective officers," and so forth, are enjoined and restrained from:

> "(3) entering into or performing any agreement or understanding among the defendants or any of them in restraint of trade and commerce in gypsum board among the several states in the eastern territory of the United States by license agreements with minimum price provisions to fix, maintain or stabilize prices of gypsum board or the terms and conditions of sale thereof."

Now, to the extent that the paragraphs numbered 1 to 10 under that article go beyond that scope, then we submit that they are improper in a decision limited, as we understand this to be, and each one of those separately numbered subparagraphs 1 to 10 introduces something beyond the scope of the decision.

I should like to refer briefly to those additional features, on the chance that your Honors may wish to consider each one of them separately.

First, paragraph 1 enjoins against the fixing of prices, terms and conditions of sale. That is all right, but then it goes on to say "at which gypsum products shall be sold"—

the same definition of gypsum products going far beyond [fol. 487] gypsum board covered by the patent licenses and licensing agreements.

Secondly, the paragraph does not stop with the words "shall be sold" but goes on "or resold." There is the charge or implied charge of resale price maintenance as to which nothing in the record before this court justifies such a decree, and as to which the Supreme Court did not take any action whatever.

"2. To fix, establish, maintain, or make uniform"—again —"the kinds, types, or varieties of gypsum products"—failing to limit it to gypsum board, and, in addition, there is an additional feature in this situation:

The only evidence in the record, with reference to which any such provision about making uniform the kinds, types or varieties of gypsum products would be that relating to the open-edge board and to the No. 2 board and seconds.

Now, as I pointed out earlier, with reference to those charges in the complaint, the defendant made offers of proof specifically directed to establish that there wasn't any agreement among them to eliminate the production of open-edge board, nor was there any agreement between them to eliminate No. 2 board or seconds.

That represents a disputed area of fact which we submit this court should not, and cannot properly, determine on motion for summary judgment. Any such decree which would make specific an injunction against conduct which would be based solely upon a disputed issue of fact would [fol. 488-489] not be justified by the record itself.

Judge Garrett: Pardon me, there. That is an enjoining clause and proposes to enjoin them from doing that.

Mr. Connelly: Yes, sir.

Judge Garrett: The offer of proof was that if they hadn't done it, hadn't been doing it—We thought that came within the sphere of the Supreme Court's decision. That is what is wrong with this injunction here, or this enjoining here, the fact that they have not been doing it.

Mr. Connelly: That is precisely our point, if the Court please, that while a decree of court of equity may in certain circumstances enjoin the doing of some acts beyond those actually shown to have been done, within limits indicated

by what the defendants have actually done, it is certainly improper to enjoin conduct as to which there has not been a proper showing that injunction is required as a remedy which is required.

Does your Honor wish to suspend at this time?

Chief Judge Stephens: We will recess until tomorrow morning at 10 o'clock.

[fol. 490] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

HOLDING A THREE JUDGE COURT

Civil Action No. 8017

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; Certain-Teed Products Corporation;; The Celotex Corporation; Ebsary Gypsum Company, Inc.; Newark Plaster Company; Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company; Sewell L. Avery; Oliver M. Knode; Melvin H. Baker; Henry J. Hartley, Frederick G. Ebsary; and Frederick Tomkins, Defendants.

REPORTER'S TRANSCRIPT OF JUNE 14, 1949

Court Room, U.S. Court of Customs and Patent Appeals, Washington, D. C., Tuesday, June 14, 1949.

Oral argument upon the proposed findings of fact, conclusions of law, and decree, in the above-entitled cause was resumed at 10:00 a.m., pursuant to adjournment, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

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[fol. 491] PROCEEDINGS

Chief Judge Stephens: Proceed.

ARGUMENT ON BEHALF OF DEFENDANTS UNITED STATES GYPSUM COMPANY, SEWELL L. AVERY AND OLIVER M. KNODE—RESUMED

By Mr. Connelly:

Mr. Connelly: At the adjournment of court yesterday afternoon, I was in the process of discussing the various provisions of the plaintiff's proposed decree and had reached paragraph 4 of Article V of the proposed decree, which is quoted at page 3 of the columnar schedule, which was handed up to the court yesterday.

Paragraph 4 of this article enjoins the defendants from refraining from selling to or distributing gypsum products to any purchaser or any class of purchasers of such products. It is completely broad and unlimited in its scope.

The only charge in the complaint that might conceivably be related to that provision of the injunction is the provision of paragraph 45(d) of the complaint, supplemented by 94 and 95.

Judge Jackson: Did you say "d," Mr. Connelly?

Mr. Connelly: D. That charge is that the defendants concertedly refrained from distributing gypsum board, plaster, and miscellaneous gypsum products through jobbers in the eastern area—in other words, the charge in the complaint is not any combination or conspiracy to refrain from selling to this, that, or the other class of purchaser. [fol. 492] This is a charge that we concertedly refrained from selling jobbers in the eastern area.

Now, even to the extent that the proposed provision of the Government's decree should be limited to jobbers——

Judge Jackson: Why?

Mr. Connelly: I say "even if"——

Judge Jackson: Pardon me.

Mr. Connelly: My first point, of course, is that the provision is so broad without any limitation that it does not bear any relation to the issues in the complaint. Therefore, I assume that the court will not entertain such a provision

but will necessarily consider it only in relation to the issues actually presented in this case. That would present the issue of the alleged agreement to exclude jobbers from the industry.

Even as so limited, such a provision in the decree is, we submit, beyond the scope of this court's determination on the motion for summary judgment, because that represents a controversial issue of fact.

It was on that specific point we made offers to prove. We made offers to prove, paragraph 56, that the license agreements were not executed with any intent to eliminate jobbers, and that there was no agreement or understanding among the defendants or any of them to eliminate jobbers.

In other words, on that phase of the case there is controversy. It is not a situation as to which there is not any [fol. 493] issue and, therefore, not a situation which the court was in a position to pass upon in granting the motion for summary judgment.

Insofar as any effect upon jobbers or, indeed, any other class of trade in the gypsum industry may be thought to have followed from the issuance of the price bulletins under the license agreements and the specification of prices therein, the injunction striking down the price provisions of the licenses and striking down those bulletins will automatically carry with it protection, if any protection be needed, against any incidental consequences of those price bulletins.

Now, paragraphs 5 and 6—I deal with them together because they are parts of the same concept—introduce into this case or attempt to introduce into this case a brand new issue, and that is the use of the basing point method of pricing in the gypsum industry.

There was no allegation in the complaint that the defendants combined and conspired to use the basing point method of pricing. There is no support in the record for any such charge.

In that connection I might just refer at this time and then I will not take the court's time to do it each time in connection with each paragraph—if Your Honors will look at page 125 of the plaintiff's memorandum, the printed, gray-covered volume—with reference to each of the provisions, articles, and paragraphs of its proposed decree, the Government has a section in its memorandum describing the

[fol. 494] purpose of that provision of the decree and then pointing out—and this is at page 125 under the subdivision headed subparagraph 5 and 6, the findings supporting the enjoined conduct are findings 43, 68, and 71. Of course, that is a reference to the proposed findings submitted by the Government.

And, similarly, with other paragraphs of the proposed decree, they point out that these provisions of the decree require findings of fact dealing with the controverted issues in order to justify a decree.

Now, these are controverted issues. They are not conceded facts. When I said yesterday that it was our view that no findings of fact nor conclusions of law were required or should be made at all on this motion, that statement was made on the assumption that this court would be entering a decree limited to the admitted facts, limited to the statements made by the Supreme Court with reference to the plurality of licenses.

In other words, operating strictly under what the Supreme Court has stated in its opinion in this case. If the decree is so limited, then, in my view, nothing more is required in the way of findings and conclusions because the decree will show on its face the precise findings and limited findings that were made in order to support the decree and the provisions of the decree will be based on those findings.

But, if the decree is to go into each of these matters, which the Government asks this court to go into, and in-[fol. 495] clude provisions which presuppose findings of fact on these controverted issues, then I certainly concur in the view of the Government that this court would under those circumstances have to make findings of fact in detail on all of those controverted issues in order to justify provisions in its decree based upon those matters.

Now, as I say, I will not refer to that in each case because that same situation applies with reference to each of these provisions of the Government's decree and in each case, as the Government itself recognizes, some specific findings over and above what the Supreme Court has determined, some specific findings will have to be made in order to justify that kind of relief.

So far as the basing point method of pricing is concerned, that problem in any industry presents, as this court well

knows, vast problems, problems of such magnitude that it has frequently been said that perhaps they should not be determined by courts at all, but should be dealt with by the legislature on the basis not of a limited record in a private litigation, but on the basis of a complete survey of all of the economic considerations involved and a full opportunity to judge what is the proper way to handle it.

Certainly, it is not a question which may properly be dealt with by this court on this record, where there was no charge that the adoption of the basing point method of [fol. 496] pricing was pursuant to a combination or conspiracy, where there was no evidence introduced in that respect.

Judge Jackson: Pardon me for interrupting. If in a decree the defendants and all of them were restrained and enjoined from doing any of the things that would be violative of the Sherman Act, it would include the basing point, would it not?

Mr. Connelly: Yes, sir, and that illustrates in my mind the precise vice of the decree being proposed by the Government. To be sure, the various injunctive provisions of the Government's proposed decree deal with conduct which under the terms of the decree is unlawful conduct because it is all directed at collusive action to do certain things.

Judge Jackson: It would have to be collusive, of course, it would; but it seems to me that a general paragraph in respect to enjoining and restraining you would be sufficient to cover these specific subparagraphs you have just mentioned here.

Mr. Connelly: That would be one way of approaching it.

Judge Jackson: How would you get out of it? You would violate the order if you did this very thing.

Mr. Connelly: That is it. One way of approaching it would be to say since the defendants have been found guilty of a violation of the anti-trust laws, then the court may in its decree enjoin the defendants against any further future violation of the anti-trust laws.

[fol. 497] Judge Jackson: Surely.

Mr. Connelly: That approach has frequently—not so frequently in recent years, but used to be frequently before the courts, and the courts uniformly and consistently said that cannot be done—that cannot be done because that puts

the defendants at the risk of a contempt proceeding as to any future alleged claimed violation of the anti-trust laws.

Judge Jackson: Of course, it should be specific enough.

Mr. Connelly: It must be specific enough.

Judge Jackson: I am talking about this particular thing now you are talking about.

Mr. Connelly: In my view, it must be related to the violations actually found to have occurred.

Now, I think this very provision we are now discussing may provide a suitable illustration of the problem that we would be presented with.

The basing point method of pricing is one of a variety of business practices. It can be, conceivably, adopted by agreement, the parties get together to use it in some improper form, or it can develop as a result of individual, independent competitive action in the industry.

In any case where a business practice acquires widespread acceptance, there is always the possibility and, indeed, the likelihood that the Department of Justice will point to action throughout an industry and say there we [fol. 498] have uniformity of action throughout an industry, we are going to ask a court to draw an inference that that uniformity was brought about not fortuitously but by agreement; and if brought about by agreement, then that would be a violation of the anti-trust laws.

If that charge should be made—and I hope I can make my position clear on this—if that charge should be made at any future time, then the defendants are entitled to try out the issues presented in a plenary trial and not try it out or have it determined in a summary proceeding to punish defendants for contempt in violating this decree.

That is our point. There has been no day in court on the part of the defendants with reference to the question of the use of the basing point method of pricing. There is only one bit of testimony in the record—and that came in in an incidental fashion, it was not directed to that issue because the issue was not presented—but the testimony was at pages 2908 and 2909 of the transcript, that the bulletins issued under these patent license agreements in referring to a basing point or what may be described as a basing point method of pricing, merely continued a practice that had been in effect for many years before.

So that there is not anything in the price bulletins, there is not anything in the combination under the patent license agreements which could properly bring into issue the question of the original adoption of the basing point method of pricing.

[fol. 499] That is a question on which the defendants have not had an opportunity to be heard and they should not now be subjected to a decree which would presuppose that they had by agreement adopted that method of pricing.

Judge Garrett: Was there any assignment of error in the Government's appeal to the Supreme Court involving that question?

Mr. Connelly: No, sir. There was not anything before the Supreme Court involving that question.

The only thing that was said by the Supreme Court—no question of a finding or anything of that sort, but in reviewing the facts at page 17 of the slip opinion of the Supreme Court, purely a background statement of how this situation came about, the Court said:

> "Although the license contracts gave the licensor the right only to fix the minimum price at which the licensee should sell, United States Gypsum issued a series of bulletins"—that is what they are talking about, bulletins—"which defined in minute detail both the prices and terms of sale for patented gypsum board. They are printed on nearly a thousand pages of the record. The bulletins adopted a basing point system of pricing, according to which each licensee was required to quote a price determined by taking the mill price at the nearest basing point and adding the all rail freight from the basing point to the destination."

[fol. 500] In other words, just one of the provisions in the bulletin dealing with the prices, terms, and conditions of sale of patented board, but, I might say, to answer Your Honor's question specifically, that is all, that is the only mention in the Supreme Court opinion of the basing point method of pricing, and all that the Court was there saying——

Judge Garrett: My recollection is not clear about it. Did it hold that that was—did it making a holding?

Mr. Connelly: It made no holding whatever. It simply

referred to it in exactly the same way as it might have said the bulletins issued by the patentee specified the price at which gypsum board was to be sold, quantities, et cetera, down the line. That is all there is in the Supreme Court's opinion with reference to that.

Now, to the extent that this court believes that the issuance of the bulletins had any bearing with reference to the basing point method of pricing, again, the decree striking down the bulletins, any action of the defendants under the patent license agreements, automatically covers it.

If this court puts in its decree a specific provision enjoining the defendants from combining or conspiring to agree or to use the basing point method of pricing, that will necessarily presuppose a finding by this court that the basing point method of pricing was adopted by combination, conspiracy, agreement.

[fol. 501] That finding, we submit, cannot be made on the record before this court at this time without having any opportunity for the defendants to introduce evidence or, indeed, without having any evidence before the court on which such finding could properly be predicated.

Now, paragraph 7, page 4 of the schedule—counsel for plaintiff has described that as being the converse or the affirmative phase of paragraph 4. It simply states in somewhat different language, positive language, to use, determine, agree upon, or adhere to any basis for the selection or classification of purchasers of gypsum products.

As I have previously said with reference to paragraph 4, that, so far as the charge in the complaint is concerned, must be limited to the charge with reference to the elimination of jobbers, insofar as the finding here is concerned, it represents a controversial disputed issue of fact which should not be passed upon by the court at this time.

Paragraph 8—this is another illustration of this tremendously broad scope of the proposed decree—paragraph 8—the injunction operates "to use, determine, agree upon, or adhere to any methods, means, conditions, practices, or delivery points or areas used or to be used in selling, shipping, or distributing gypsum products."

Now, of course, I have already referred to this phrase "gypsum products." It is not even limited to gypsum board,

[fol. 502] which is the subject of the suit and which was the subject of the Supreme Court's decision.

But even if limited to gypsum board, it would be far too broad as a provision to be included in this court's decree. It affects any possible practice that might be adopted in the gypsum industry at any time in the future. If all they mean to attack by that, all they mean to reach by that, should be the terms and conditions of sale other than price, that is adequately, fully covered by the injunction against agreeing upon any prices, terms or other conditions of sale.

If it means something more than that, then I submit it is far too broad for inclusion in this decree.

Paragraph 9 deals with the question of policing prices.

Paragraph 10 deals with the question of holding meetings, conferences, et cetera, for the purpose of maintaining prices.

Again, both of those paragraphs are subject to the vice that they are not limited to gypsum board, they are limited to the gypsum industry without definition. But, beyond that, these matters are purely incidental to the question of fixing prices, a decree which strikes down the fixing of prices, which has been found to be wrongful here, will automatically cover any incidents thereto.

So far as the meetings are concerned, the record, I submit, is abundantly clear before this court that there were no meetings among the licensor and the licensees, except [fol. 503] (1) to explain doubtful provisions of the price bulletins and (2) to consider complaints of license violations.

In other words, meetings only with reference to action taken under the price bulletins, under the minimum price provisions of the patent licenses.

Now, Section 6 of the Government's proposed decree, with reference to compulsory licensing, we dealt with in large part yesterday in answer to questions by the court. There are just two or three additional points that I should like to cover here.

First, in the language of the Government's proposed decree, you will note that it reaches patents or patent applications now or hereafter owned or controlled by U.S.G., without any limitation so far as time is concerned.

Secondly, that the patents and patent applications re-

ferred to are those not confined to gypsum board, but relating to gypsum products of any kind.

In those respects, this compulsory licensing provision goes far beyond what the court held in the most extreme cases that we have had to deal with, which is the Hartford-Empire case.

Now, our position here is that there just is no resemblance between the facts of this case and the facts of the Hartford-Empire case. This compulsory licensing provision involves confiscation of private property, and we do not say that that may never be done. Of course, a court of equity has broad powers, and, certainly, the Hartford-Empire decision illus-
[fol. 504] trates the extreme extent of those powers in an appropriate case—and that was the case where the District Court held, and its holdings were affirmed by the Supreme Court, that all of these members of the glass industry there involved had been engaged in a scheme, a plan to fix prices and to keep out competition and had used these patents, which had been pooled together, not for the purpose of exercising any legitimate rights under their patents, but for the purpose of providing a disguise for their illegal purpose.

No one can read the opinion of Judge Kloeb in the District Court in that case without coming to the conclusion that the court there found that there was a complete absence of good faith on the part of the defendants, that the court there concluded that it was dealing with a group of people who were deliberate law violators and who were aiming precisely, specifically, and definitely to violate the Sherman Act, and in that situation it issued a decree which was so broad, indeed, that even the Supreme Court did not affirm certain of its provisions and directed the elimination of others.

Judge Jackson: Mr. Connelly, I do not believe anybody questions the good faith of the defendants here, because they thought they were acting under the authority given by the General Electric case. I was just wondering if Judge Reed just does not put you in the same spot that he put the defendants in the Hartford-Empire case.

[fol. 505] Mr. Connelly: There is nothing that I have seen in the opinion of the Supreme Court in this case which

suggests a conclusion that these defendants should be treated as were the defendants in the Hartford-Empire case.

Judge Jackson: I think on page 34 I saw something that made me think that.

Judge Garrett: The slip opinion?

Judge Jackson: Yes, the slip opinion, when he talks about the invalidity—he says here:

> "These licenses and bulletins show plainly a conspiracy to violate the Sherman Act."

Now, in the Hartford case they said there was a conspiracy to violate the Sherman Act, and as I said before, while nobody questions the good faith of the defendants in acting as they did in this case, does not the opinion of Judge Reed really put the same principles applicable to you that he applied there? That is the thing I would like to be cleared up on.

Mr. Connelly: I submit that he does not. To be sure, he reaches the conclusion that the industry-wide price control under patent licenses was invalid per se.

To the extent that he reaches a conclusion that conduct violates the Sherman Act, then, of course, that conclusion parallels in a sense every other case, every other determination in which other people have violated the Sherman Act.

Judge Jackson: He uses that rather opprobrious term [fol. 506] "conspiracy."

Mr. Connelly: That is of necessity because that is the language of Section 1 of the Sherman Act itself. He could not use anything else.

Judge Jackson: That was the conspiracy in the Hartford case, so held.

Mr. Connelly: That was. Our position here, as we interpret what the Supreme Court has said, interpret this court's construction of that, that here we have a situation where the acts of the defendants were all in good faith in the belief that all they were doing was merely protecting the rights of the patentee and that it was lawful to protect the rights of the patentee by issuing licenses with price control not only to one licensee, but throughout, to as many persons in the industry as desired to accept licenses.

Now, the Hartford-Empire situation did not stem from

that conduct and, of course, the court will have to have in mind the detailed facts of the Hartford-Empire case, which I do not want to take the time of the court now to go into, but that case had in general to do with a gathering of the competitive industry in the familiar smoke-filled room atmosphere: How are we going to establish a way to fix prices in this industry and keep out unwanted competition?

The documents, the memoranda that were written, all indicated that was the approach of the parties in that case. [fol. 507] Judge Jackson: They knew they were wrong and did it with malice aforethought, deliberately, premeditated?

Mr. Connelly: That is right.

Judge Jackson: They knew they were doing wrong.

Mr. Connelly: As the court there found. I am not myself attempting to pass judgment on what the parties were doing, but simply from the standpoint of what the District Court found that these people were doing.

The arrangement under which the patents were assigned to Hartford-Empire placed in a pool with the limitations that were there put upon it, was hit upon as a device for accomplishing the objectives which the parties to that combination knew or should have known were unlawful.

Now, the factual situations are just so entirely different in the two cases that I cannot——

Judge Jackson: They stem from different roots, but I am wondering, after all, if the patents are in the hands of one power to direct the actions of an industry, from there on is not the situation parallel?

Mr. Connelly: Well, the essential point of difference, which seems to me to be controlling in this case, is this: U.S. Gypsum Company has certain patents. Now, let us suppose it had never issued any of these licenses which are here under consideration. It had the power to exclude others from making its patented devices, it continues to have [fol. 508] that today so long as it preserves its patents.

That situation has not been affected by the combination itself. In other words, the right to exclude stems from its ownership of patents under the patent law, lawfully acquired.

In the Hartford-Empire case that was not true. Certain of the glass manufacturing companies had patents on one

kind of machinery, other of the companies had patents on others. If that combination, if the members of that combination had remained in competition one with the other, then glassware might have been made under one group of patents by one, under another group of patents by another, and so on. That possibility of competition through various devices of manufacturing glassware was destroyed when they got together and placed all of the patents in a single hand.

At that point there was no way of re-instating the competition that previously existed or previously had the opportunity of existing because the patents—with or without providing for compulsory licensing under the patents, because the patents had then, as the result of the combination, not as the result of lawful conduct, but as the result of the combination, been placed in the control of the Hartford-Empire Company, and there was no way in which anybody could make a single piece of glassware by machinery without infringing one or another of the patents held by Hartford-Empire. It was just not feasible for anyone to get into [fol. 509] that industry without some provision for licensing under those machine patents.

Here, to be sure, the monopoly is there to the extent that it attaches to the patents, but insofar as that monopoly exists by reason of lawful conduct on the part of the United States Gypsum Company, not by reason of unlawful combination, then this court should not confiscate its property unless it feels that its conduct in entering into these license agreements was in bad faith, indicated a propensity for law violation.

Now, I also in answer to Judge Stephens' question yesterday commented briefly upon our proposal in this connection and I will not, of course, repeat that. I stated that it did not involve any recognition on our part of any desirability or necessity for the kind of compulsory licensing we are dealing with in the Hartford-Empire situation; but I should like to add one observation to those I made yesterday, to explain why we make this suggestion in the form of the decree.

The Supreme Court did not characterize all of the patent license agreements in their entirety as illegal. The Supreme

Court characterized the price-fixing provisions of the patent licenses as illegal.

[fol. 510] In other words, if all the defendant U.S.G. had done was to issue a license on a royalty basis to each other member of the industry, I take it that nobody would contend there was anything illegal in that. It was inclusion of the price-fixing provisions that made it illegal.

Now, we were confronted with a mechanical problem in considering what to do about that. It could be treated in some situations by simply striking out the price-fixing provisions of the license agreements. That is what was done in the Line Material case, the Line Material decree, left the license agreements in effect so far as the right granted to the licensee to make the product, so far as the royalty provisions are concerned, and the like, and simply eliminated by decree from those license arrangements the price-fixing provisions.

That could be done there because the form of the license agreement was such that there was no room for ambiguity, it was a specific provision or portion of the license that were readily identifiable; and that left in effect the right of the licensees to continue to make the patented products.

In this situation the form of the license agreements did not seem to lend itself to that kind of treatment, and in order to give effect to the conclusion that the price-fixing provisions were illegal, it seemed, to us at least, that the only way to deal with that problem was to cancel the agreements in their entirety and to provide for a new agreement iden-

[fol. 511] tical or substantially identical with the old, except for the elimination of price-fixing provisions.

Judge Jackson: You have not submitted a form of that license, have you?

Mr. Connelly: I was coming to that here. On the theory that it would be an imposition upon this court and also lead to lengthy and unnecessary proceedings to be coming back to this court at various times in the future to determine whether provisions of license agreements were proper, reasonable, and the like, we have prepared forms of license agreement, which we conceive to be unobjectionable in any respect, eliminating any provision of the prior license agreements that has been attacked, price-fixing provisions, and others. I will hand this up to the court.

Chief Judge Stephens: Have you handed one to Mr. Knuff?

Mr. Connelly: Yes.

Judge Jackson: Do you desire, Mr. Knuff, to furnish a copy of license agreement of the type that you provide for in your compulsory licenses?

Mr. Knuff: If the court wants us to, we will.

Judge Jackson: I was just wondering. If you care to. you may.

Mr. Knuff: I did not hear you, Your Honor.

Judge Jackson: I say if you care to, you may.

Mr. Knuff: May I consider it without giving an answer [fol. 512] right now?

Judge Jackson: Oh, certainly.

Chief Judge Stephens: It would be a very great convenience to my colleagues, I should think, if the Government did furnish it. Otherwise, my two colleagues have to sit down and draw a license agreement if they should conclude that the suggested plan for a license agreement, if they should conclude that the form of suggested license agreement which you have in mind in your proposed decree, Mr. Knuff and Mr. Steffen, is enforceable; but, having no form in hand evidencing it, they will have to draw it themselves and then that will require more proceedings.

Mr. Knuff: I would not think they would have to draw it, Your Honor. They could do as I suggest in the decree.

Chief Judge Stephens: Well, they would in effect have to, Mr. Knuff, because if they simply put those terms in the decree and then the parties draw a license agreement in respect to which they are in dispute with the Government as to whether it conforms to the decree, they will have to come back to the court again for a hearing on whether or not the license agreements under which you are operating are in conformity with the decree of the court.

I had supposed that both sides, after reading over these papers, I had supposed that both sides would present proposed forms of license agreements. However, you are not required to do so.

[fol. 513] Mr. Connelly: I might suggest that perhaps it would be of help to the court if counsel for the plaintiff would examine the form of license agreement which we have prepared, and I feel almost certain that they shall

have no reasonable objection, at least, to any provision contained in that form of license agreement.

Now, I have stated, perhaps at greater length than need be, our position with reference to compulsory licensing generally, and I have indicated at least specific objections to the very broad features and provisions of this section of the decree proposed by the Government.

The next section of the Government's decree, Article 7, appears at page 7 of the schedule.

Judge Jackson: How about those that you are skipping, Mr. Connelly?

Mr. Connelly: I have said I certainly have objections to the language, certain of the language included in those subparagraphs.

Judge Jackson: For the same reason that you gave as to subparagraph 1?

Mr. Connelly: There are certain other detailed reasons. My hope, of course, is that this court will conclude that there is no occasion for the kind of compulsory licensing proposed by the Government. If it so conclude or, rather, should conclude that such provision should be adopted in [fol. 514] substance, then I think from what I have heretofore said about its application, what I have heretofore said with reference to paragraph 1, without going through in detail the other paragraphs, that will indicate the same kind of objection applicable in those other subparagraphs as well without taking time to go through them specifically.

Judge Jackson: Your paragraph in Roman numeral VI, in your opinion, is what should be done with respect to the subject matter of 6 as proposed by the Government, is that it?

Mr. Connelly: In its entirety with all of its subparagraphs, yes, sir.

Now, Section 7 of the Government's proposed decree, appearing at page 7 of the schedule, provides for the cancelation of the patent licenses. There is no difference in substance in view between us on that score. As we indicated at page 7 of the schedule, or Article 4 in paragraph 1, it declares the minimum price provisions illegal and, too, provides for the immediate cancelation and termination of the patent licenses.

Judge Jackson: Should not that be Article 7 in your column? Your last one is 6.

Mr. Connelly: For the purposes of the court's convenience, we have rearranged the articles of our form of decree in order that they may be seen as they correspond to the Government's.

Judge Jackson: I see.

Mr. Connelly: I might say in that same connection, in our form of decree provision is made for immediate can- [fol. 515] celation and termination of the patent licenses. We provide against the possibility that any present licensee might thereby be adversely affected by leaving a space in the form of license agreements, which we have just handed up to the court, to insert the effective date of that form of license agreement, which we would assume would correspond to and be identical with the effective date of the decree; so that the licensee would at all times be protected by the rights that they have to make the patented products.

Now, the second paragraph of the Government's Section 7 is substantially the same as our Article 5, paragraphs 1 and 2, where we strike down the patent license agreements and enjoin the defendants from reinstating them.

Article 8 of the Government's proposed decree contains an injunction against tie-in sales. Note, if Your Honors please, this is a provision directed against each of the defendants. I submit that this is a completely fantastic provision to include in this decree.

The plaintiff itself concedes at page 146 of its memorandum, about eight lines down from the top:

> "In what follows we will demonstrate that the provision is a proper one although there was no evidence introduced relating to tie-in sales."

Judge Jackson: What page is that on?

Mr. Connelly: 146.

[fol. 516] Judge Jackson: The last sentence of the paragraph?

Mr. Connelly: The last sentence. In other words, this court is being asked to include an injunctive provision in its decree, not only without any charge in the complaint of the conduct attacked, but without any evidence in the rec-

ord whatever to support it and nothing in the Supreme Court decision, may I add, to support it.

Section 9 of the decree in like manner deals with the question of non-discriminatory sales. Again, I might break that down into two possibilities. I am not entirely clear whether by that the Government means to require the defendants to sell to persons who may apply therefor, or whether it means merely that the defendants shall not discriminate.

In either event, there is no charge in the complaint which would support any such provisions, there is no basis in fact for the conclusion of such a decree here.

Now, again, I have the same comment that I made before and will not therefore repeat here, the plaintiff's memorandum indicates under each of these sections various of its proposed findings of fact, which would have to be made in order for this court to include these provisions in the decree. I certainly concur in that.

If the court is going to include those provisions, it will have to make the plaintiff's suggested findings of fact; and if the court does that, it will be making those proposed find-
[fol. 517] ings of fact on disputed issues of fact as to which the defendants have not been given an opportunity to submit proof.

Section 10 of the Government's decree, the same situation, provides an injunction against acquiring the assets, stock, and so forth, of the other defendants or of competitors.

Of course, under some circumstances that might be unlawful conduct, but our point is that that was not an issue in this case. That is not dealt with in a charge in the complaint. While, to be sure the pleadings admit certain mergers and allegations alleged in the complaint, there is no record made with reference to the competitive situation or with reference to the effect upon competition of any such mergers or consolidation, and it is wholly outside the scope of any determination that the court might properly make of this case here.

Like other provisions of the decree, in other cases, against other factual backgrounds, it might be entirely appropriate, but it is not appropriate and it is not justified by the record before this court at this time.

Section 11 of the Government's proposed decree deals with the right of inspection that the Department of Justice always likes to put in these decrees. There is nothing really troublesome about it, except that there is no occasion for it. There is nothing in the record of this case which indicates any inability on the part of the Attorney General to obtain whatever information he desires, and there is not anything [fol. 518] in this case to indicate any unwillingness on the part of the defendants, not only to comply with the specific provisions of the decree, but to provide such information as the Attorney General may properly request.

If in spite of the defendants' objection to that proposed provision of the decree, this court concludes that it should grant the Government that relief, then I would like to suggest one amendment to the paragraph in addition to that which counsel for the Government made yesterday.

In the first sentence, where it begins, "That the Attorney General of the United States or his proper representatives shall for the purpose of securing compliance with this decree," I would like to suggest the striking out of the word "shall" after "representative," and then after the word "decree," "securing compliance with this decree," to insert "and for no other purpose, shall, upon written request of the Attorney General——

Judge Garrett: Will that harmonize there? It begins: "That the Attorney General of the United States or his proper representative shall"—and you are striking that—"proper representative, for the purpose of securing compliance with this decree, and for no other purpose, shall, upon written request of the Attorney General——"

Mr. Connelly: "Of the Attorney General," yes, sir, as distinguished from any other representative of the Department of Justice.

[fol. 519] Judge Garrett: The Attorney General would not make a written request of himself, I guess.

Mr. Connelly: It would be in his name, of course.

Judge Garrett: Very well. "Shall, upon written request of the Attorney General——"

Mr. Connelly: "—addressed to any defendant at its principal office."

The only purpose of that suggested amendment is so that any acts that may be taken pursuant to this provision, if

the court should adopt this provision of the decree, would be sure to come to the attention of the proper officials of the company and not be dealt with in some branch office or in some manner in which the defendant was not properly apprised of what the Attorney General sought to do.

Paragraph 12 needs no special comment. We have not, as suggested by counsel for the plaintiff, made any suggestion that costs should be taxed against the Government. Of course, that cannot be done. We have, however, recognition of the fact that this court has a discretionary power with reference to the awarding of costs and in effect asked the court to exercise that discretion in favor of these defendants found guilty of law violation, but only on the basis of good faith action on their part.

Chief Judge Stephens: You suggest that there should be some apportionment among the defendants of such costs as [fol. 520] are imposed?

Mr. Connelly: No. The blank percent is a provision merely to suggest that the court may omit in whole or in part the costs to be taxed against the defendants.

Chief Judge Stephens: I guess it was the Government's suggestion as to costs. I saw a suggestion among the papers here that the costs be apportioned among the defendants. Did you make that?

Mr. Knuff: No, indeed, Your Honor. It might be a good idea, that the court apportion all the costs among the defendants.

Judge Jackson: Let them get together in a meeting and say what they ought to pay, whatever it may be. Have you any suggestion as to what percent should be put in here?

Mr. Connelly: I would consider it presumptuous for me to make such a suggestion.

Judge Jackson: Well, how in the world can we do it? Should we toss up a coin and say, "Heads, 20, the other 50," or what?

Mr. Connelly: The court has power to refrain from taxing any costs against the defendants. The court has power to tax a portion of the costs, any fraction that may seem desirable; and, as I say, I should not want to be in the position of suggesting to Your Honors how that discretion should be exercised beyond calling to Your Honors' atten-

tion the fact that this is a case where that discretion may properly be exercised.

Judge Jackson: It could be a judgment entered without costs.

[fol. 521] Mr. Connelly: Yes, sir. As to Section XIII of the proposed decree with reference to the retention of jurisdiction of the cause, the differences between the Government's decree and the form of our decree are very minor.

Judge Jackson: Judge Stephens just suggested that probably we ought to know what the costs are going to be. We do not have the remotest idea. I suppose somebody could give us a notion on that. Or can you at this time?

Mr. Connelly: I am sorry, I am not personally in a position to do that. I do not know.

Judge Jackson: And you, Mr. Knuff?

Mr. Knuff: No, I am not, Your Honor.

Chief Judge Stephens: Can you give us any general estimate? Would it run into hundreds of thousands of dollars or a few hundreds of dollars or a few tens of thousands? What sort of costs does the Government presume—suppose the majority of the court decides to tax costs against the defendants rather than leave each party bear its own costs? What costs would the Government file against the defendants?

Mr. Knuff: Well, we would file everything that we can properly tax in this case. Now, I grant you that that is not a specific answer, but I have not gone into what can be specifically taxed. We will tax everything that we can.

Chief Judge Stephens: You cannot make any estimate at all, even very large figures?

[fol. 522] Mr. Knuff: It would be just a guess, Your Honor, because I have not gone into it all.

Chief Judge Stephens: Thank you. Proceed, Mr. Connelly.

Mr. Connelly: The two provisions with reference to the retention of jurisdiction differ in only minor respects. In the Government's proposal, line 5 in the schedule, reference is made to any other person, firm, or corporation that may hereafter become bound. That seems to me to leave open a question which should not properly be before this court. The only persons who are not now identified or

identifiable who could conceivably be bound by the provisions, the injunctive provisions of the decree, are the officers and directors of the defendant companies as they become officers and directors.

The second provision that we object to in that clause is the last five words thereof, where jurisdiction is retained for the enforcement of compliance therewith and the punishment of violations thereof.

Now, obviously, the retention of jurisdiction for the enforcement of compliance includes any questions of punishment, but having in mind what we conceive to be our position in the case, as technical violators, if you will, of the anti-trust laws, but with no intention so to act, and certainly without any indication on our part that we are not going to comply to the utmost and in the best of faith with any provisions of the decree as finally entered, it just seems [fol. 523] to be an unnecessary addition to talk about the punishment of violations.

Now, paragraph 7 of the form of decree suggested in our form, with part of which the Government is apparently willing to go along, as Article 14 of its proposed decree, represents an attempt to be somewhat specific in excluding from the area in which the decree is operative, areas in which the decree should not be urged as being operative.

Now, Your Honors, I might say there is no specific situation that I have in mind in referring to acts and operations of the defendant outside the United States, but we also have in mind that this is a decree which will be governing the lives of these businesses for years to come. The anti-trust laws operate against conduct affecting interstate trade or commerce and also trade or commerce between the United States and foreign nations.

Over and above that is an area of trade which the United States anti-trust laws do not purport to reach and presumably could not reach, and that is to say trade wholly between foreign nations not affecting trade here.

As Your Honors also know, there are many, or at least some foreign countries wherein under the laws of those countries themselves some action must be taken with reference to price which, if taken in this country and relating to United States trade or foreign trade, would constitute a violation of the anti-trust laws.

Therefore, to provide against that possibility, we think it [fol. 524] appropriate to exclude from the provisions of this decree defendants' acts and operations outside the United States or acts inside relating exclusively to acts without the United States.

That provision is substantially identical with the provisions contained in the decrees entered in United States against Bausch and Lomb, 321 U.S. 707; in U. S. against Line Material Company, the decree referred to by our friend yesterday; and also in United States against Hartford Empire Company.

The second portion from the semi-colon on in our Article 7 I take it is agreeable to the Government, and, therefore, we need not comment further with reference to that.

Now, in dealing with these various specific terms and phrases used in the Government's proposed decree, I have felt it appropriate to point out specific respects in which I think the Government's proposed decree is improper. I do not wish to be understood as limiting the objections to the specific terms, the definitions, and so forth. Our objection is a fundamental one that goes to all of the provisions of this decree that go beyond what we conceive to be the proper scope of the court's determination on motion. There is no question about the power of the court to include the kind of provisions we are here discussing in its decree if the case is appropriate to those provisions.

Our point is that the facts of this case do not either require them nor do they justify them.

[fol. 525] It is no answer, as I said a moment ago, no answer to our objection, to say, "Well, after all, the conduct enjoined is illegal conduct, why should you object to it?"

It is always true that in the preparation of these decrees the lawyers from the Department of Justice—apparently also from some of the law schools—want to get into the decree every conceivable violation of the anti-trust laws that they might attach to some conduct on the part of the defendants.

It is also true that businessmen must live under this decree and under these decrees for years to come and questions will arise, if they do arise, under circumstances that none of us here can reasonably foresee and foretell. Our

point is as to any matter which was not directly involved in this court's decision, which was not based upon the facts of this case, ought not to be included in the decree. If any charge is made against us in the future that our conduct has been collusive and, therefore, wrongful in other respects, respects other than the patent license agreements, then we want—and I submit we are entitled to—an opportunity to try those questions out in a plenary suit and not on summary proceeding to punish us for contempt.

I submit further that the guiding principle that should control the court's action in framing its decree is that the punishment should fit the crime. That is the principle which we attempted to follow in preparing the form of decree which we have submitted as Exhibit A to our memorandum. [fol. 526] The heart of that decree is in Article V. It is page 2 of the schedule. That enjoins:

> "Each of the defendant companies and each of their respective officers, directors, agents, employees . . . are hereby enjoined and restrained from:
>
> "(1) the further performance or enforcement of any of the minimum price provisions of the Patent Licenses, including any price bulletin issued thereunder."

That strikes down the present licensing set-up.

> "(2) entering into or performing any agreement or understanding among the defendants or any of them for the purpose or with the effect of continuing, reviving or reinstating any of the minimum price provisions of the Patent Licenses."

In other words, we cannot do anything in the future to reinstate this arrangement which is now being stricken down.

> "(3)—this is the one that covers any other future arrangement that might be made—"entering into or performing any agreement or understanding among the defendants or any of them in restraint of trade and commerce in gypsum board"—it is limited to that —"among the several states in the Eastern Territory of the United States"—that is the charge of the com-

plaint—"by license agreements with minimum price provisions"—that is the means which we have used—"to fix, maintain or stabilize prices of gypsum board or the terms and conditions of sale thereof."

[fol. 527] That, we submit, is all-inclusive to cover any possible violation that may be found here.

Your Honors, of course, will ask: Well, now, does that cover everything that the Supreme Court has said on the basis of which this court has acted? Because it goes to the very heart of the case—I have only a few more minutes to take, if Your Honors will indulge me. I would like to risk some brief repetition just to call Your Honors' attention now in the light of what I have just said to these statements by the Supreme Court in an attempt to demonstrate to you that what I have just read from the form of decree which we have submitted covers fully everything that the Supreme Court has passed upon on the basis of which this court has granted motion for summary judgment.

[fol. 528] Chief Judge Stephens: Before you enter upon that concluding part of your argument, we will take a fifteen-minute recess.

(Short recess)

Chief Judge Stephens: Proceed, Mr. Connelly.

Mr. Connelly: At the recess I was just about to ask the court to look again at the precise statements made by the Supreme Court to test the propriety of my statement that in our form of decree we had fully covered what the court dealt with.

The first reference, just in passing, at page 6 of the slip opinion, page 371 of 333 U.S., towards the bottom of that page, just before the statement, "Up to this point there is no dispute as to the facts," that begins the paragraph at the bottom of the page. In the preceding pages the court has been reviewing what it describes as the undisputed facts, the area in which this court presumably acted in granting the motion for summary judgment; and the court there said:

"In that year"—that is to say, 1929—"two sets of license agreements were signed in which United States

> Gypsum licensed all but two companies manufacturing gypsum board in substantially identical terms and from that date United States Gypsum has maintained rigid control over the price and terms of sale of virtually all gypsum board."

In other words, limited to price, terms of sale, and it is [fol. 529] limited to gypsum board, not "other gypsum products."

Next at pages 389 of 333 U.S., page 23 of the slip opinion, at the bottom of the page in the slip opinion, the sentence begins, "To us, these facts"—that is to say, the facts just recited with reference to industry-wide license agreements, price control, adherence with knowledge—"these facts are proof of a conspiracy. Certainly they are overwhelming evidence of a plan of the licensors and licensees to fix prices and regulate operations in the gypsum board industry."

Continuing thereafter:

> "If the District Court had thought that a plan such as is evidenced by the license agreements and the bulletins was illegal under the Sherman Act, it might have had a different conclusion on the question of the admissibility of the declarations of some appellees against all. Its position"—that is to say, the position of this court in the prior trial—"stemmed logically from its understanding of" . . . the General Electric case.

And, again, at page 27 of the slip opinion, near the top of page 393 of the other volume, just a single sentence——

Chief Judge Stephens: What page of the slip opinion?

Mr. Connelly: Twenty-seven, about the middle of the page of the slip opinion, a single sentence reading:

> "The license agreements and the bulletins establish the conspiracy of the licensor and each licensee to [fol. 530] violate the Sherman Act."

And, lastly, at pages 34 and 35 of the slip opinion, beginning at the bottom of page 34, "The General Electric case affords no cloak"—that appears near the bottom of page 400 of 333 U.S.:

> "The General Electric case"—this is the conclusion, this is the statement of law announced by the Supreme

Court on the basis of which this court has granted summary judgment—"The General Electric case affords no cloak for the course of conduct revealed in the voluminous record in this case. That case gives no support for a patentee, acting in concert with all members of an industry"—I am pausing there for a moment —that reference, in the light of what the Supreme Court has previously said, is clearly to all members of the gypsum board industry because that was the only state of facts before the court and the only one to which it was directing its attention. Continuing the quotation——

Chief Judge Stephens: Did you read the word "board" in there, Mr. Connelly? Did I so understand you?

Mr. Connelly: No.

Chief Judge Stephens: Excuse me.

Mr. Connelly: Continuing with the quotation:

"—to issue substantially identical licenses to all members of the industry under the terms of which"——

[fol. 531] then the language continues——

"the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized."

Those references to competitive unpatented products, to distributors, are all modified by the language "under the terms of which."

In other words, under the terms of the license agreements themselves, that is all that the court was talking about or considering in its language here with reference to the other matters. Then the court continues:

"We apply the 'rule of reason' of Standard Oil Company v. United States, 221 U.S. 1, to efforts to monopolize through patents as well as in non-patent fields. Even in the absence of the specific abuses in this case, which fall within the traditional prohibitions of the Sherman Act"—pausing there.

The reference there to the specific abuses, the traditional prohibitions, those are dealing with the areas of disputed facts, not the facts which were admitted as to which there was no issue on motion for summary judgment.

In the absence of all of that, the court continues:

> "—it would be sufficient to show that the defendants, [fol. 532] constituting all former competitors in an entire industry"—and, again, parenthetically, the Supreme Court is talking in terms of the board industry —"had acted in concert to restrain commerce in an entire industry under patent licenses in order to organize the industry and stabilize prices. That conclusion follows despite the assumed legality of each separate patent license, for it is familiar doctrine that lawful acts may become unlawful when taken in concert."

That conclusion is predicated upon a conclusion in the Masonite case, which the Court proceeds then to discuss.

In other words, all of these pronouncements of the Supreme Court, which the construction of the majority of this court has determined justified the granting of a motion for summary judgment, which this court has determined to justify the conclusion, we can disregard any and all proof that the defendants might put in because that would not change this court's conclusion with reference to the basic proposition. All of that relates to the issuance of industry-wide patent licenses with the price provisions and the bulletins issued thereunder.

Now, the reference at the end, in connection with the final conclusion of the Supreme Court in this respect to the Masonite case is of some interest. There, as Your Honors will recall, is a similar situation in this respect: in that the Masonite Company had issued del credere agency agree- [fol. 533] ments to an entire industry. Each one of those agreements, taken by itself, was admittedly lawful, just as in our case each one of our patent license agreements with price fixing was admittedly lawful.

Nevertheless, the court held that the effect of the combination, plurality of the several agreements, each one by itself lawful, when it reached the point of covering an entire industry, that achieved a situation which the Supreme Court

regarded as unlawful, as a violation of the Sherman Act, not the traditional Sherman Act violation but a violation which was in a sense newly announced by the Supreme Court at that time.

Because of that analogy to the situation in our case, it seems to me that the court might well be interested in the decree entered in the Masonite case. From what I have already said I think Your Honors will understand that in my view each case must be taken individually, that no two cases are precisely analogous, and that the relief to be accorded must be tailored to fit the needs of the immediate case.

Nevertheless, to the extent that any analogy may properly be made, the closest certainly to the facts of this case and the decision of the Supreme Court in this case is its decision in the Masonite case and I, therefore, have here a copy of the final decree entered in that case, copies of which I should like to hand to the court at this time, not with the idea that I shall take any time to discuss its provisions, but merely that with that decree before you, Your Honors will, [fol. 534] I believe, find it support and very compelling support for the proposition which I have here asserted.

That is, that the form of decree proposed as a part of our memorandum affords adequate relief, full measure of relief, to the Government in this case to deal with the precise violations of law of which we have been found guilty.

Chief Judge Stephens: Mr. Connelly, I am not quite clear with reference to one aspect of your argument. Do you concede that the admitted facts in this case, upon which my colleagues have granted the motion for summary judgment, include the existence of a plan to blanket the industry for patent licenses?

Mr. Connelly: No, sir.

Chief Judge Stephens: I assume you did not. In some of your reading here of this I got a different impression.

Mr. Connelly: Perhaps I should qualify my answer in this respect. To the extent that the Supreme Court considered the agreements themselves, the plurality of agreements a plan in and of itself—and I think the Supreme Court opinion is susceptible of that interpretation—and, of course, since we admit the agreements in the plurality, we admit what the Supreme Court has described as a plan; but

beyond that, certainly that is a highly contested issue and one which was specifically dealt with in our offer of proof.

Chief Judge Stephens: You stand on the same position, in other words, that the defendant took throughout the trial [fol. 535] of this case?

Mr. Connelly: Precisely.

Chief Judge Stephens: That there was no action in concert or plan to blanket the industry with patent licenses.

Mr. Connelly: Beyond the mere——

Chief Judge Stephens: That is still in the realm of contest?

Mr. Connelly: Yes, sir.

Judge Garrett: I understood the Chief Judge to ask if you conceded the findings of fact made by the Supreme Court, which at least two members of the Court thought were findings of fact, if you conceded them. I understand, of course, that you are contesting any decree that goes beyond that which we construed the Supreme Court to have held upon the facts as you have conceded, I believe, in four instances here.

I do not know if I am making myself clear.

Mr. Connelly: You are speaking now of our concession that the patent license agreements were entered into, that they contained price fixing provisions, that bulletins were issued thereunder, that the parties adhered to those price provisions with knowledge of the adherence by others?

Chief Judge Stephens: And that they were industry-wide.

Mr. Connelly: Industry-wide, yes. I am sorry that I left that off.

Judge Garrett: And the Supreme Court held that, as a [fol. 536] matter of law, to be a violation of the Anti-trust Act.

Mr. Connelly: We understand that to have been Your Honors' determination, Your Honors' construction of the Supreme Court's opinion in that respect, yes, sir.

Judge Garrett: May I ask you: Do you construe it differently?

Mr. Connelly: That involves the entire question presented on the motion for summary judgment, which, of course, we did oppose on the basis of a different construction.

Chief Judge Stephens: You are not assuming to re-argue that?

Mr. Connelly: That has all been decided.

Chief Judge Stephens: You are not deviating from Mr. Bromley's position?

Mr. Connelly: That is correct.

Chief Judge Stephens: Your position, as I understand it, is just what it was when you opposed the summary judgment on the motion, that a mere plurality of patent licenses with price fixing provisions industry-wide adhered to by the parties is not ipso facto a violation of Section I of the Sherman Act.

Mr. Connelly: That is correct. We are simply not arguing that here because that has been decided against us before.

Judge Jackson: That was the theory——

Chief Judge Stephens: My colleagues have taken the position, as I understand it, that that does constitute under [fol. 537] the opinion of the Supreme Court a violation of the Sherman Act, that that is ipso facto, as a matter of law, action in concert, a conspiracy, to use the vernacular of the Sherman Act. You contended at the time you contested the summary judgment motion that the Supreme Court had not so held, and you contended on the motion for summary judgment that that was not the law.

Mr. Connelly: Precisely.

Chief Judge Stephens: The other defendants may choose their own order of appearance. It seems to have been chosen.

Mr. Finck, you may proceed.

Argument on Behalf of Defendant National Gypsum Company

By Mr. Finck

Mr. Finck: If Your Honors please, the other defendants have agreed upon a time schedule and the order of their appearance, and may I hand this up to the court? We

would like to be held strictly to the time so that every one of us will have an opportunity.

Chief Judge Stephens: This time schedule seems reasonable to the court. National Gypsum, one-half hour; Certain-teed, fifteen minutes; Celotex, twenty minutes; Ebsary, ten minutes; Texas Plaster, Mr. Gloyd, five minutes; Newark, one-half hour. You have come a long way, Mr. Johnston, to speak for five minutes. You have come a long way from Arkansas to speak for five minutes.

Judge Jackson: Of course, that is the maximum time. If you finish in less time than that, you will not compel the [fol. 538] court to have you continue.

Mr. Finck: I hope to.

Chief Judge Stephens: Proceed, Mr. Finck.

Mr. Finck: May it please the court, the defendants, National Gypsum Company and Melvin H. Baker, have filed a separate memorandum in opposition to the plaintiff's proposed findings, conclusions, and decree.

We have not had an opportunity or, at least, we did not feel that we should file objections to the proposed findings of fact and conclusions of law and also to the decree submitted by the defendant, United States Gypsum Company. We thought that that might just confuse the issues here, but we would like an opportunity to enter and file some reply to the submission that they have made.

Chief Judge Stephens: Say that again, Mr. Finck, will you, please. I was occupied with the time keeping and did not get all your statement.

Mr. Finck: Well, we have filed a memorandum in opposition to the Government's proposed decree and findings of fact and conclusions of law. We have not had an opportunity to file any opposition to the proposals of the U.S.G.

Chief Judge Stephens: I see.

Mr. Finck: We feel there are some differences of opinion and broad, wide differences of opinion. We think we ought to be permitted to file a memorandum with respect to our [fol. 539] differences sometime between now and August 1.

Judge Jackson: That is a long time.

Mr. Finck: Well, this is vacation time, and we have gone along for several years in this matter. I should think that we would have that opportunity. We are widely separated, the vacation period is on, and the other defendants or the

other licensees might want to have some conference with respect to just what we want to do. We have not had a conference, we have not decided whether we want to file anything or not.

Chief Judge Stephens: When was the proposed decree of U.S.G. filed, Mr. Connelly?

Mr. Connelly: March 4, 1949.

Chief Judge Stephens: I see.

Mr. Connelly: The memorandum filed by National was filed after receipt of this. I must say, speaking for the United States Gypsum Company, I cannot see any possible justification for imposing upon this court or upon the defendants for further opportunity to deal with something that has been before all parties since March.

Mr. Finck: If the court please, we will try to take it up right here. We may find no necessity for it.

However, we did feel that it was an imposition on this court. We were treating with the proposals of the Government here, not with any proposals of the United States Gypsum Company. We all had the opportunity to make our [fol. 540] statements and file our memoranda in March, and it is true that we have had it, we have had time to submit it, but it seems to me that it would only confuse the issues here, and if we should have an opportunity, why, it is all right.

Judge Jackson: If you can make yourself clear, do it here, and it will be in the record.

Chief Judge Stephens: Of course, we must conclude this hearing today if we have to sit tonight.

Judge Jackson: I am not going to sit tonight.

Chief Judge Stephens: It seems to me, Mr. Finck, that we ought to get this matter disposed of and disposed of shortly. At least two members of the court will be away during the summer. I expect to be here, but I think Judge Garrett will be away. I am not so sure of that. I know Judge Jackson is going to be away all summer, and we will not be in position to act as a court again in this case until next fall.

I had thought that one of the reasons why the time extensions were granted here to the defendants was so that they might confer with each other with respect to the proposed findings of fact and conclusions of law and decree and come to some unified position, if they could do so.

I should think we ought not to extend time unless it is absolutely necessary for you to file a brief as late as August.

It has been the intent of my colleagues, I am sure, to get this decree and such findings of fact and conclusions of law [fol. 541] as they see fit to enter disposed of before the first of this coming month of July.

Mr. Steffen: May I ask a question, Your Honor?

Chief Judge Stephens: Mr. Steffen.

Mr. Steffen: I am not quite clear from Mr. Finck's statement as to the issues that he feels he would like to make a showing upon, but if they have to do with the proposed licenses, I think that there will be a number of points that will have to be negotiated: the amount of the royalty, what patents are to be covered, and things of that sort. If that is one of the things upon which you would like to be heard——

Mr. Finck: It certainly is one of the things.

Mr. Steffen: It cannot be handled in five minutes, I am sure.

Mr. Finck: That idea that I propound at the moment has just come to me. We have not thought about it, I have not talked with any of the others about it.

I think, though, there are differences here which must be negotiated and which we must be able to present to this court in order to get a fair and just decree.

Judge Jackson: Negotiation on what? What for?

Mr. Finck: Licenses and as to the method that they are to be compelled to give us licenses. That is issue 6 and 7, which I will argue right now.

Judge Jackson: You are a licensee, are you not?

[fol. 542] Mr. Finck: Yes, I am.

Chief Judge Stephens: Your proposed license agreements, Mr. Connelly, do they include provision for royalty?

Mr. Connelly: Yes, sir, and counsel for all of the licensees have been furnished with copies of the proposed licenses.

Judge Jackson: I am just wondering of what concern to the court is that, as to what the royalties are? That is something to hash out between you, is it not?

Mr. Finck: No, I do not think we can.

Chief Judge Stephens: I think, if I may suggest, Judge Jackson, if the court is going to prescribe licenses, it will have to prescribe them in all respects.

Judge Jackson: Oh, yes, it has, but if the parties get together on what they consider to be a proper royalty, it is no concern of the court.

Mr. Finck: I will not say that we can not, but I do think we have to have some arbiter here.

Judge Jackson: If you arrive at an impasse, I suppose, yes, you will have to have an arbiter.

Mr. Finck: That is right.

Judge Jackson: Go ahead with your argument.

Chief Judge Stephens: It seems to me, Mr. Finck,—if my colleagues disagree, they will say so—since you have had the benefit of this proposed decree by the United States [fol. 543] Gypsum Company and proposed findings and also the defendants for some months, that the defendants ought to have come to an agreement upon such matters. Of course, if they have not and cannot, it may be necessary for the court to postpone this matter until fall.

Judge Jackson: Have you been negotiating?

Mr. Finck: No.

Chief Judge Stephens: We want to avoid that, if possible, so please take additional time, if necessary, and see if, by evening, you cannot come to some agreement on those matters. Proceed.

Mr. Finck: Now, these defendants, National Gypsum Company and Baker, are in hearty accord and concur in and adopt all of the objections stated by Mr. Connelly, very ably, and with respect to the proposed findings of fact and conclusions of law. We also see no reason why there should be further findings of fact or conclusions of law. We think, as you do, Judge Garrett, that the Supreme Court has laid down all the facts and conclusions that are necessary, and a rewrite by the Government counsel will certainly only confuse the matter further.

Now, with respect to the decree proposed by the Government, we also join in and adopt the objections of the United States Gypsum Company to all the sections of their proposed decree, with the exception of 6 and 7, and those provisions have to do with compulsory licensing, and 7 is with respect [fol. 544] to the cancellation of the contract and the enjoining of any further proceedings under these contracts.

Now, Mr. Connelly states that, of course, the licensees

would object to paragraph 6 because it simply compels U.S.G. to do a lot of things.

Well, he is entirely wrong, and the facts are just about as opposite as they could be. These licensees are intensely interested in obtaining and continuing to manufacture under these patents. This court knows very well that all of the licensees have operated under these patents since 1929, they have built their plants so that they may use the licenses, and a great investment has been made throughout this country based on these contracts.

Now, when we entered into the contracts and the other licensees as well, we were offered these contracts by United States Gypsum Company on the assumption—and we certainly took it for granted—that they were legal agreements. Of course, we investigated as far as we could and we felt the same way. We relied on the General Electric case and we find that we were mistaken.

However, these contracts were offered to us, and we built up a gypsum industry, which is based, a board industry, particularly, on these contracts.

Now, of course we want a license, but we do not just want an option for 60 days and have these licenses cancelled [fol. 545] and thrown overboard and then leave us there with plants that we cannot use unless we infringe their patents.

Now, the court has found that they have misused their patents, and it does not seem to me that they would have to go very much further to take the patents back for such misuse and return the patents to the public domain. That has been suggested in many cases.

We do not ask that they do that, but we ask that we be given a fair right to take patents, or take license agreements under these patents under fair terms and conditions.

Now, we have read these license agreements which they have submitted to us, about a week ago, and we have read them over. We have had no time to talk to them about them. I do not agree with the one that was submitted to me or any one of them that was submitted to me, and at the present time we could not take them. I do not know that we could adjust our differences within 60 days.

Under the circumstances I do not think that we should be compelled to adjust our differences within 60 days. I

think this court should follow the principle laid down in these other cases, the Hartford-Empire case, the Lead case, and particularly the case where Mr. Connelly represented the licensees, he took an entirely different position. He got the kind of decree that we want. He got exactly what we want in the Line Material case, and the facts in that case are certainly no more difficult than the facts in this case. [fol. 546] There was no flagrant violation in the Line case, and they worked that out and gave the licensees a good, fair opportunity to agree on their license agreements.

Now, it seems to me that the principles involved—and Judge Jackson mentioned that—there must be some principle of law here. We cannot just take every fact and adopt some new idea. In the Empire case they misused the patents, and the public interest was to be protected, as well as the licensees, and there they followed this principle which has been laid down in these cases subsequently, and I think it is a good principle, not because we are only licensees, but I think that it should be followed. It has been followed in other cases exactly like this one.

Now, in respect to Section VII of the Government decree, I like it better than the suggestions made by United States Gypsum Company, because they match Section VII with a proposed Section IV, which separates the legal from the illegal portions of this contract.

Now, it seems to me that these license agreements and the bulletins were an integral part of a plan to blanket the industry, and they were in violation of the Sherman Act and, therefore, they are either good or they are bad. I do not see how you can just pick out the minimum price provisions and say, "Here, this is legal, and the other parts [fol. 547] are all illegal," if they were used for an illegal purpose.

I mean, it was not only the minimum price provision that was used for an illegal purpose. It was the whole agreement, the whole bulletin, and the court said so.

Now, I do not think you can make a separation of that kind and say, as they do in No. 4, they say the minimum price provisions of the patent licenses are hereby declared illegal.

Now, if that is so, and you want to delete that from the present contracts, then I am satisfied, and you do not need

to bother with any compulsory licensing or anything else. If these contracts are legal, say so.

The Masonite case was mentioned just a few minutes ago by Mr. Connelly and there he said everything about the contracts, but he did not say they were declared illegal. They did not say the price fixing agreement in the Masonite case was legal and that everything else stood and that they could force on us those old provisions of the contract.

Suppose you write out a decree setting forth these provisions. Why, then, of course, you have declared that all of the other provisions except the minimum price provisions in these present agreements are legal, and that they can enforce them or they can force us to take them in the new contracts. There are a lot of provisions in this contract that I do not believe would stand up if they did that, because they compel us to pay royalties on board which is not made [fol. 548] under the patents. But they could do it under a decree such as this.

I think you have got to fish or cut bait. You have got to say these are either legal or they are illegal.

Now, if you want to say that the patent license agreements are declared illegal only as to the minimum price provisions, then you can also say that the rest of the agreement stands just as it is, and we will stand right on that.

Chief Judge Stephens: The thing that troubles me about that, although I am something of an observer here, because I am in a dissenting position—perhaps my questions might be helpful to my colleagues—the thing that troubles me about that position, Mr. Finck, is that I thought my colleagues were entering the summary judgment upon the theory that the Supreme Court had held that on the undisputed facts in the case, to wit, that there were license agreements executed by the defendants, containing price-fixing provisions, industry-wide, adhered to, there was an ipso facto violation of the Sherman Act, regardless of any plan or action in concert or intent to commit a conspiracy or the like.

If that is the theory of the judgment to be entered by the court, how can the court go further and strike down all of the other items which were in issue between the parties? How can it enter a decree which rules and controls those

phases of the case which were in vigorous dispute between the parties under the pleadings?

[fol. 549] Mr. Finck: I do not think these parts were in dispute, were they?

Chief Judge Stephens: I do not want to get into an argument with counsel on the subject. I thought there were a vast number of disputed issues in the case. I outlined them in the opinion of the court. The charges of the complaint were in paragraphs 44, 45, and 46, as I remember it. You are familiar with those. But the defendants denied substantially all of those charges except the execution of the license agreements and their terms and provisions, denied that they were taken out non-bona fide, and denied any plan to monopolize or to violate the Sherman Act. I do not understand that this summary judgment, which has to be entered upon in a situation only where there is no genuine issue as to a material fact can go beyond the limits of the undisputed facts.

Perhaps you and I are talking about two different things.

Mr. Finck: Mr. Connelly makes the same argument for the provision as I am against it. He talks about good faith, but the Supreme Court said that regardless of motive, these violate the Sherman Act. I do not see how we can get beyond that. Good faith has nothing to do with this. I do not think there was ever any dispute as to whether or not there was ever any mention on this as to whether the contracts were severable or not.

Chief Judge Stephens: Did you object to the entry of the [fol. 550] summary judgment?

Mr. Finck: I objected and stood on my answer. That is all.

Chief Judge Stephens: Very well.

Mr. Finck: I made no proffer of proof.

Chief Judge Stephens: Very well.

Mr. Finck: Now, as to the validity of the agreements, the Supreme Court, of course, said nothing about their validity, but it certainly implied an invalidity of the agreement, and I think you also have a precedent which has been offered here by Mr. Connelly, but in the Masonite case, which has been cited so often here, the court declared the contracts illegal, I think; and if you will look at your

memorandum on page 2 of the Masonite case in the third paragraph, it is very clearly stated that:

> "Each of the following agency agreements is adjudged unlawful under the anti-trust laws of the United States and is illegal, null, and void."

And then they list them.

Chief Judge Stephens: Where are the Government's proposed provisions on that?

Mr. Finck: Their proposed provisions are 4 and 5, but they match their 4 with 7 of the Government's proposed decree, which states that each and all of the patent license agreements and contracts, and so forth, relating to all the products, are cancelled as of the effective date of this agree-[fol. 551] ment, and so forth; and when and as we enter into new agreements with the Government or upon 60 days from the date of entry of this decree, whichever is earlier. They want to strike that out and separate the legal parts of this present license agreement from the illegal parts.

Now, I would like to make just a few observations with respect to paragraph 5 of the Government's proposed decree.

Chief Judge Stephens: What paragraph?

Mr. Finck: Paragraphs 4 and 5 of the Government's decree and the suggestions made by the United States Gypsum Company, No. 5 in its suggested decree.

Paragraph, now, 4 of the Government's decree applies to the applicability, and we have no quarrel with that, and the first paragraph of United States Gypsum Company proposed Section V is perfectly all right. I think we go along with United States Gypsum Company on the first paragraph, which reads:

> "Each of the defendant companies and each of their respective officers, directors, agents, employees, representatives, subsidiaries, and any person acting or claiming to act under, through, or for them, or any of them are hereby enjoined and restrained from . . ."

And then they substitute for the injunction of the Government, with which we heartily agree, and we subscribe to everything that Mr. Connelly has said with respect to Sec-

[fol. 552] tion V of the Government decree. We think that the injunctive provisions there are utterly ridiculous and unnecessary. They cover every conceivable item that might have been covered by the bulletins, and we licensees had nothing to do with the bulletins. They were forced on us.

These restraints that the Government seeks to inflict on us have been inflicted on us right along by the United States Gypsum Company, and I see no reason for transferring it from them to the Government.

But it seems to me that everybody will be well protected if paragraph 5, as suggested by United States Gypsum Company eliminates paragraphs 1 and 2, subdivisions marked 1 and 2, and that we can all rely on the protection of the public and protection from further violation of the anti-trust laws if subdivision 3 stands alone, and that has been read several times.

It restrains the defendants from entering into or performing any agreement or understanding among the defendants or any of them in restraint of trade and commerce in gypsum board among the several states in the eastern part of the United States by license agreements with minimum price provisions to fix, maintain, or stabilize prices of gypsum board or the terms and conditions of the sale thereof.

That would be sufficient, but they tried to again impose upon the licensees in this decree that they want to restrain further performance of any of the minimum price provisions [fol. 553] of the patent licenses, including any price bulletins issued thereunder, and they also ask that we be restrained from entering into or performing any agreement or understanding among the defendants or any of them for the purpose or with the effect of continuing, reviving, or re-instating any of the minimum price provisions of the patent licenses.

Now, they leave open everything else. They do not disturb the other parts of the present agreement.

Chief Judge Stephens: For example?

Mr. Finck: For example, the claim for royalties on the manufacture of unpatented products.

Chief Judge Stephens: What others, Mr. Finck? I am asking only to get in mind your point. What other items?

Mr. Finck: Well, I have no other specific ones. There may be many of them, but that is one.

Chief Judge Stephens: How does the Government's proposed decree deal with this?

Mr. Finck: The Government's proposed decree simply says that the license agreements are cancelled and that the defendants are enjoined and restrained from further enforcement of the agreement.

Now, in the Line case the decree contained an injunction for past infringements and all things of that sort, but they cut off those agreements entirely, did not leave them open.

Chief Judge Stephens: Mr. Knuff, where is the cancella-
[fol. 554] tion provision in the Government's decree?

Mr. Knuff: The cancellation provision is contained in Section VII; the compulsory license feature of the Government's decree is contained in Section VI.

Chief Judge Stephens: Proceed, Mr. Finck.

Mr. Finck: If the court please, I have probably overstayed my time.

Chief Judge Stephens: You have not. Your time is just up so far as your own use of it is concerned. The court has taken about ten minutes of your time with questions.

Mr. Finck: I have very little left to say, except to urge the court and trust that they will refuse to find additional facts and conclusions of law, because they are unnecessary, and that this court either cancel the license agreements, the present license agreements, in toto and declare them illegal and void or if the court finds that only the minimum price provisions should be treated with and declared illegal, as requested by U.S.G., then to let the present license agreements stand and delete only those provisions of the contract.

We will have no difficulty. That will do away with a great deal of complication.

And lastly, if you find that these license agreements, the present ones, should be cancelled and terminated, then the licensees should have adequate protection, as provided in the protection given in the Line case and as suggested by the
[fol. 555] Government.

Now, I am not asking for everything as specifically stated by the Government. I just want it substantially, that is all, and I think you will hear from other licensees who feel exactly the same as we do.

Judge Jackson: I am getting the impression—it may be

erroneous—that you are afraid you are going to be frozen out of this business.

Mr. Finck: No.

Judge Jackson: Afraid your business is going to be wrecked? Your investment is going to go for naught, and you are going to have to operate at a loss?

Mr. Finck: It might be impaired, yes, because it would take a long time to transfer over to some other method of operation, yes.

Judge Jackson: But you would still be in the gypsum board business?

Mr. Finck: We would. I do not know about some of the others.

Judge Jackson: Would that have to be under license from U. S. Gypsum?

Mr. Finck: No, I think probably there are ways of making gypsum board without use of these patents, but we do not use them.

Judge Jackson: You do not use them anyhow.

[fol. 556] Mr. Finck: We use these licenses.

Judge Jackson: I thought you just said you did not.

Mr. Finck: I say there may be ways of manufacturing without using the bubble patent, but we do not use the other ways because we find we are all set up to manufacture under the bubble system, and it is a good, economical way of making wallboard. We like it.

Judge Jackson: Straighten me out on this, too. Do you feel, then, if the court in its decree should adjudge that all applicants for licenses should be granted licenses at a reasonable royalty, that you would be included thereunder, but that if the court did not do that, you would not be there included?

Mr. Finck: I do not care whether you grant——

Judge Jackson: I do not see what you are talking about, Mr. Finck, honestly.

Mr. Finck: I think that it is very difficult to negotiate an agreement like this with the patentee, and it will take us more than 60 days. All they suggest that we have—they toss an agreement at us and they say, "You accept this within 60 days or you are out."

Now, I do not think that is a fair way, after we have set this whole thing up, paid them thousands of dollars of roy-

alty over a period of years since 1929. I do not know that we can. I hope we can get together with them within 60 days or less, but we should be protected in case we cannot, and [fol. 557] this has been gone into by the other parties for months.

Judge Jackson: Do you feel as though you would lack protection unless this court adjudges that U.S.G. shall give freely licenses—compulsory licenses? Do you feel you would lack protection without that?

Mr. Finck: License the present licensees. I am not asking that they go all out and license everybody, no, I did not ask for that. I just say substantially, as set forth in No. 6.

Mr. Steffen: Six of the Government's decree?

Mr. Finck: Six of the Government's decree.

Judge Jackson: What?

Mr. Finck: I am talking about paragraph 6 of the Government's decree.

Judge Jackson: I thought you mentioned 7, too.

Mr. Finck: Seven, too.

Chief Judge Stephens: I think my colleagues, at least one of them so stated to me, are still confused about what you want, Mr. Finck.

Judge Jackson: I do not get it.

Chief Judge Stephens: Judge Jackson does not get it, and I confess I do not understand just what you are asking for. You say no language in the mechanics of this thing can be handled so that a decree can be entered within the next two or three weeks, and is there not some way in which the mechanics of this thing can be handled so that a decree can [fol. 558] be entered by my colleagues on the summary judgment here in some form other than that which relates to the licenses to be extended and some provision made for, some agreement come to between Government and defendants that the operations under the present license agreements may go on, except with respect to price fixing, until some reasonable time has expired within which you could come to the terms on the license?

Mr. Finck: Well, if the court can devise some other method——

Judge Jackson: The court is not going to devise anything. We are waiting to get information from you lawyers.

Mr. Finck: That is what we are trying to give you, Judge Jackson, the method that has been devised in similar instances and which—this method has been studied for months and months.

Chief Judge Stephens: Spell it out again to us. We just do not understand it, Mr. Finck. Possibly we are thick on the subject, but we have got to understand it. Try again.

Mr. Finck: We want a provision similar to paragraph 6 as set forth in the Government's proposed decree, which reads as follows:

> "1. That the defendant United States Gypsum Company is hereby ordered and directed to grant to each applicant therefor, but only insofar as it has the right to do so, a non-exclusive license to make, use and vend under any, some, or all patents and patent applications [fol. 559] now or hereafter owned or controlled by it relating to gypsum products"—and I, for one, go along with United States Gypsum Company, and "gypsum products" should read "gypsum board"—"their processes or methods of manufacture, or their uses.
>
> "2. That defendant United States Gypsum Company is hereby enjoined and restrained from making any sale or other disposition of any of said patents or patent applications which deprives it of the power or authority to grant such licenses, unless it sells, transfers or assigns such patents and patent applications and requires, as a condition of such sale, transfer or assignment, that the purchaser, transferee or assignee shall observe the requirements of Sections VI and XI of this decree and the purchaser, transferee or assignee shall file with this court, with notice thereof to the Attorney General, prior to consummation of said transaction, an undertaking to be bound by the provisions of Sections VI and XI of this decree.
>
> "3. That defendant United States Gypsum Company is hereby enjoined and restrained from including any restriction or condition whatsoever in any license or sublicense granted by it pursuant to the provisions of this section except that: (a) the license may be non-transferable; (b) a reasonable non-discriminatory roy- [fol. 560] alty may be charged, provided, however,

that the royalty so charged may not be imposed upon or measured by patent-free products, processes or uses; (c) reasonable provision may be made for the cancellation of the license upon failure of the licensee to pay the royalties as hereinabove provided; (d) the license must provide that the licensee may cancel the license at any time by giving 30 days' notice in writing to the licensor; and (e) the license must provide that the licensee shall immediately have the benefit of any more favorable terms granted other licensees. Without limiting the generality of anything hereinbefore provided, the license may not contain any provision authorizing, allowing, or permitting defendant United States Gypsum Company to inspect the books and records of any licensee."

Now, with respect to that provision and the former provisions, I do not say that we would demand all of that. I think that we would have to negotiate some of this. We have not had a conference with the Government or anybody else since we have been familiar with these suggestions. To go on with the suggested paragraph VI or Section VI of the Government's proposed decree, subdivision 4:

"That upon receipt of written request for a license under the provisions of this section, defendant United States Gypsum Company shall advise the applicant of [fol. 561] the royalty which it deems reasonable for the patents or patent applications to which the request pertains. If the parties are unable to agree upon a reasonable royalty within 60 days from the date such request for the license was received by United States Gypsum Company, the applicant therefor may forthwith apply to this court for the determination of a reasonable royalty, and United States Gypsum Company shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General with the right to be heard thereon. In such proceeding, the burden of proof shall be on United States Gypsum Company to establish the reasonableness of the royalty requested by it, and the reasonable royalty rates, if any, determined by the court shall apply to the applicant and all other licensees under the

same or substantially the same patents or patent applications. Pending the completion of negotiations between the parties or any proceeding before this court, the applicant shall have the right to make, use and vend under the patents or patent applications to which his application pertains without payment of royalty or other compensation, but subject to the provisions of subsection 5 of this section.

"5. That where the applicant has the right to make, use and vend under patents or patent applications under [fol. 562] subsection 4 of this section, United States Gypsum Company may apply to the court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty, if any. If the court fixes such interim royalty rate, United States Gypsum Company shall then issue and the applicant shall accept a license, or, as the case may be, a sublicense, providing for the periodic payment of royalties at such interim rate from the date of the filing of such application by the applicant. If the applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such action shall be grounds for the dismissal of his application. Where an interim license or sublicense has been issued pursuant to this subsection, reasonable royalty rates, if any, as finally determined by the court shall be retroactive for the applicant and all other licensees paying a higher royalty rate under the same or substantially the same patents or patent applications to the date the applicant files his application with the court.

"6. Nothing herein shall prevent the plaintiff or any applicant from attacking, in the aforesaid proceedings or in any other proceedings, the validity or scope of any patents or patent applications nor shall this decree be construed as importing any validity or value to any of said patents or patent applications."

[fol. 563] Chief Judge Stephens: Now, Mr. Finck, I think I understand you. Let's see if I do.

While you do not insist upon all the provisions of Section VI of the Government's proposed decree, and you would be glad to see removed from it the phrase "gypsum prod-

ucts" and have put in substitute therefor the words "gypsum board"——

Mr. Finck: That is right.

Chief Judge Stephens: —and while you would not insist upon non-exclusive licenses being granted to all persons, but only to the present licensee defendants——

Mr. Finck: That is correct.

Chief Judge Stephens: —nevertheless, you would, if necessary, content yourself with this proposed Government's decree, paragraph VI, including its subdivisions, and if that was entered by the court, then there would be no necessity for immediate approval of license form; is that right?

Mr. Finck: That is right.

Chief Judge Stephens: I see your point.

Mr. Finck: And that same provision has been used in the Line, Hartford, and the Lead case.

Chief Judge Stephens: I think we understand you now, Mr. Finck.

We will now adjourn until two o'clock.

(Whereupon, at 12:40 p.m. a recess was taken until 2:00 p.m. of the same day.)

[fol. 564] Afternoon Session 2:00 p.m.

Chief Judge Stephens: Mr. Miller for Certain-teed.

ARGUMENT OF BEHALF OF DEFENDANT CERTAIN-TEED CORPORATION

By Mr. Miller:

Mr. Miller: May it please the court, our position briefly is this: We agree that by reason of the granting of the motion for summary judgment, all that was decided in this case and all that is before the court for determination in connection with the decree to be entered is the establishment of a violation of Section I of the Anti-Trust Act by reason of the plurality of licenses containing price-fixing provisions, the issuance of the bulletins, and the adherence by

each of the defendants to the license agreements with knowledge of the adherence of others.

For that reason we joined and concurred in the objections filed by U.S.G. to the findings and conclusions of law submitted by the Government and to the objections filed by U.S.G. to all provisions of the Government's proposed decree, with the exception of Articles VI and VII.

I think it has to be admitted that the Supreme Court has found that these license agreements and the price bulletins issued pursuant thereto were violative of the Sherman Anti-Trust Act. Therefore, those license agreements are illegal, and they cannot be clothed with legality by reason of the [fol. 565] fact that the parties did not intend a violation of the Act and relied in good faith on the General Electric case.

The fact that they are illegal I think is established by the language of the Supreme Court, and the recognition of that in a very similar situation which is contained in the Masonite decree, which was submitted to Your Honors for consideration.

Chief Judge Stephens: You think, then, do you, and you yourself are willing to contend that the Supreme Court has held not that there is a prima facie case of illegality, but a complete case?

Mr. Miller: No, I feel, Your Honor, that by virtue of the entry of the summary judgment in this matter, it has been determined for all purposes in this case that as to that one narrow issue, there has been a violation of the Sherman Anti-Trust Act.

Judge Jackson: As held by the Supreme Court on that construction of it.

Mr. Miller: That is right, sir. Now, with the contracts illegal and no longer of any force and effect, we, the licensees, submit ourselves to this court, a court of equity, for protection against the monopoly which then vests in U.S.G. To that end we say that Article VI, particularly Article VI of the Government's proposed decree, gives us the protection that we desire.

Chief Judge Stephens: You do not mean to say you want to be protected against monopoly, do you? You mean to say you want to have the benefit of it.

[fol. 566] Mr. Miller: We want to have the benefit against the monopoly which otherwise would exist if U.S.G. were

not compelled to make license agreements with the various defendants.

Chief Judge Stephens: There is another way of arguing it, isn't there, that since you have been licensees and were relying upon the General Electric case for your action, you think you ought not to be deprived of the benefit of the licenses to the extent that they are legal.

Mr. Miller: That is exactly right. In that connection I would like to point out to Your Honors that since 1929 Certain-teed and the other licensees have not only made the investments in plant and equipment to use these licenses, as Mr. Finck brought out earlier this morning, but we have made very large contributions to U.S.G. by way of royalties, running into millions of dollars, the purpose of which and the recognition of which was to be used in general research for the benefit of all, not only the licensor, but of the licensees as well.

Because of that fact, we feel that Article VI of the Government's proposed decree gives us the benefits of that subsidy which we have created for the benefit not only of ourselves but of U.S.G., that we should be entitled to patents, maybe limited to some reasonable period of time, on inventions that have been discovered during the period up to this date and within the reasonable period from and after this date, which would flow from the research work that was made [fol. 567] during the time that our moneys were contributed to U.S.G.

Chief Judge Stephens: You say you would be entitled to patents or do you mean licenses?

Mr. Miller: Licenses, availing ourselves of the benefits of those patents which are applied for and secured by U.S.G.

Judge Garrett: Do you think the Government agrees with you on that?

Mr. Miller: Yes, sir.

Judge Garrett: By this Article VI?

Mr. Miller: Yes, we do, Judge Garrett. We believe we and the Government, with some modifications in that Article of a minor nature, are in agreement.

Judge Garrett: Such as? You are coming to that, I suppose.

Mr. Miller: We have already taken care of that, and Mr. Dallstream, who will follow me, will present to Your Honors the exact changes we desire to make in both decrees which would give us the decree we would be satisfied with and which we hope that Your Honors will adopt.

Judge Garrett: I suppose counsel for the Government will tell us whether they agree with that.

Mr. Miller: I assume they will.

Judge Jackson: I think they do in that they say in that Article VI that U.S. Gypsum is ordered and directed to grant each applicant—that means any applicant.

Mr. Miller: That means any applicant.

[fol. 568] Judge Jackson: That would take care of you, would it not?

Mr. Miller: Yes, sir. I think our position is now fairly clear in this matter. I just wish to make one or two further references.

As I have said, we in accord with everything else, apart from Article VI and Article VII, with the position ably presented by Mr. Connelly, and I will not belabor the court any further with any expressions on that matter, except with regard to Article XI we feel a little more strongly than Mr. Connelly does.

Article XI of the Government's proposed decree provides for inspection of our books and for inspection of all the other books. We do not believe that in a case of this kind—that is on page 9 of the comparison sheet presented by Mr. Connelly. Under the violation established here we do not believe that a blanket subpoena in advance of any wrongdoing should be granted to the Government, and we feel that Section, that Article and Article V go far beyond any matters the Government is entitled to.

Judge Jackson: You do not agree with Article XI as proposed to be amended by Mr. Connelly?

Mr. Miller: I think the amendment takes some of the vices out of it. I do not think it goes far enough. I think the entire Article should be removed, and I do not think Mr. Connelly would disagree with me on that.

Mr. Connelly: I think I stated the position that the entire [fol. 569] Article should be eliminated.

Mr. Miller: With respect to the Line Material decree, which Mr. Connelly referred to, we are willing to accept, as

Mr. Connelly was, representing licensees in that case, a decree drawn along those lines embodying Article VI of the Government's proposed decree.

With regard to the Masonite decree, I think I would like to defer any further statement about that because Mr. Dallstream, who was very active in that case, representing the licensees there, is going to follow me and will also present in his statement the exact changes we feel ought to be made in these decrees.

Chief Judge Stephens: Mr. Dallstream, for Celotex. Proceed.

Argument on Behalf of Defendant The Celotex Corporation

By Mr. Dallstream

Mr. Dallstream: May it please the court, we are appearing on behalf of The Celotex Corporation, the late-comer in this industry, and to refresh the recollection of the court about the status of The Celotex Corporation in this case, it acquired through liquidation of the assets of American Gypsum Company in 1939, only a few months before this suit was filed, the assets of American Gypsum, and in so acquiring those assets was obliged to assume the liabilities of that company which included the onerous provisions of this license agreement or series of license agreements which were held by American Gypsum Company.

[fol. 570] I hope the court will not misunderstand and think we are crying at this stage of the game about our situation or our plight as we find it, but what I am going to say about some of the injunctive provisions of this decree, I think, requires this preface.

There was included in the license agreements, these standard agreements, a provision that in the event of the sale or transfer of the assets of the American Gypsum Company, it should be incumbent upon it to see that the terms and provisions of this license agreement were taken over, assumed, and observed by the transferee of its assets. That became an obligation of American Gypsum Company back in about 1929, which so far as we have known up until the time of the pronouncement of the opinion of the Supreme Court

in this case, was a valid, subsisting, binding obligation on American Gypsum Company and one which we were obliged to observe or else lose our license and become a patent infringer.

And so for a few months we did observe whatever had been the practice in that industry in that we did not change any prices or any of the terms or conditions of sale.

We have continued to pay royalties until after the Supreme Court decision and for some time thereafter. I think perhaps we were the last one to stop paying royalties pending a final decision in this case.

Now, I feel particularly strong in my feelings about this [fol. 571] whole question of injunctive relief against The Celotex Corporation. We neither participated in, had any knowledge of, or had anything to do with the ten or eleven years of history concerned with these patent license agreements during which all of the events which were spread before this court in the months that this case was tried. We were a total stranger to them because we were not in the business and did not have anything to do with it.

We came into the business because we felt we had to have gypsum products in our line if we were going to serve the same type of customers that had to be served if we were going to be in the other businesses in the building industry in which we were engaged.

We bought a little plant at Port Clinton, Ohio, capable of serving only a very limited territory, which territory has been further limited by all of the horizontal freight increases. Some time later, when Mr. Gloyd, reaching a very advanced age, decided that he must sell his business, we bought his plant down in Texas which, again, serves only a very limited area.

Our two plants are so close together in serving trade as not to even be able in a term of hours, to travel by train from one area to the other.

We have two isolated spot areas in which we serve the gypsum industry, and that is all. We are not competitive anywhere else and I do not know that we ever will be. Cer- [fol. 572] tainly, if the Government is to say that at this late date, after seeing the strongly entrenched units in this industry build themselves up to where they are able to serve the country on a national basis, we are now to be excluded

from ever buying any plant unless we go through the almost impossible provisions of coming before this court and asking you to pass upon it, I do not think we will ever be any bigger in the gypsum business than we are now and we are right down at the tail end with two small, isolated plants serving only spot territories and not in any sense competing in the same territory.

I particularly feel that in the case of Celotex, there may be reasons why those differences should exist as to other people, we have done nothing in this case that could possibly bring upon us any condemnation except we did not undertake to do the thing we could not have done—namely, carry on years of litigation that would have ruined us financially in an effort to try to establish what the Government has taken years to do in this case, with all the power of the Federal Government and all of the money with which to prosecute the case.

Under those circumstances I feel particularly aggrieved that we should be included under this long injunctive relief that is requested by the Government in which we are to be enjoined from everything that conceivably could violate provisions of the anti-trust laws under the latest and most novel theories of the Department of Justice, when we have [fol. 573] not done any of those things at any time.

I have always felt that when it comes down to this sort of decree, the injunctive provisions should be designed to prevent those things which are shown by the record to have been the kind of conduct that you might expect of the defendants in that case unless enjoined, and that a court of equity does not issue injunctions merely for the purpose of showing its power, but it does it for the purpose of preventing abuses which the record shows might occur if that injunctive relief was not granted.

I think this case is singularly free from any indication that anyone wished to flaunt the anti-trust laws or to disregard the modern changes in those laws as interpreted by the Supreme Court.

I venture to say there is not a single defendant in this case that would try to step over the line not only of what is the law today as announced, but as it may be changed and ordered from time to time by further interpretations of the Supreme Court without any injunction.

And so I feel Mr. Connelly's argument that there is no need in this case to enjoin acts save and except the continuation of these agreements under which because of the uniformity and the breadth and the scope of the application of those acts throughout the industry have come under the condemnation of the court.

I recall quite clearly the first of that type of case—namely, [fol. 574] the Masonite case—because I was most active in that case. In that case there were sweeping findings of fact, clearing those defendants from any possible charge of having entered into any type of conspiracy. But Masonite had reserved in the agency agreements the right to control the price of their own products which their own agents, as they saw it, were selling.

They entered into an agreement with Celotex, which was the principal distributor at that time and had just lost a patent case. In those negotiations the record shows that Masonite agreed they would not appoint any other agents. So there could not have been at the time of the inception of that agreement any possible violation of the anti-trust laws. The Supreme Court said the earlier agreement probably did not transcend the anti-trust laws, but when they reached the point that at some time, which Mr. Justice Douglas said he did not have to determine, that they were enough people under the blanket of that type of agency agreements that the industry was more or less controlled thereby, that then and at that time the conspiracy was born. Without ever answering, if you please, just what happened to those who entered into their agreements in good faith at a time when they were legal.

In the Masonite case, in which Mr. Hugh Cox represented the Government, we were faced with the same problem that we are here. The agreements were held null and void, illegal, for the reasons stated. What about these agents that had [fol. 575] built up this business for Masonite and had invested large amounts of money in sales promotion and securing wide distribution of these products?

A court who had found that no one had done anything wrong, but that this new law that was announced had made the contracts illegal, was forced to do equity as between those people who had been working together.

In that case the court contented itself with declaring the contracts illegal for the reasons stated and void.

The same sort of protection of the agents which has been asked for in this case was asked for in that case. Judge Cox finally said, "Why don't you try to work this thing out?" We all agreed we did not think we could do it. Our efforts had been to naught so far.

Finally I was selected tentatively to represent all of the agents. Counsel for Masonite was the second person, and Mr. Hugh Cox, representing the Government, was third, and we labored for about a week and we came forward with something which with very few changes was finally satisfactory.

And so in the Masonite case we did not have any of these provisions because even the Government came in and joined with us in representing to the court that an agreement that was fair, that ran for sufficient years, that properly protected the interests of all parties concerned and the public had been entered into.

Now, in this case we have differences of opinion. These [fol. 576] various agents, some of them have a few plants, some of them have many, some of them are using this patented process and not some of the others. There is not complete uniformity in the extent of use. There are some differences as between the agents themselves and with U.S.G. in the development.

I want to make it quite clear that as far as I am personally concerned, I have not been asleep on this, I have been cooperating with U.S.G. in an effort to see if we could work out satisfactory agreements. The agreements which they have handed up are in the main—a couple of minor points—satisfactory to us, except for the fact that they do not protect us against the problem that U.S.G. might be unwilling to see that we were kept competitive in respect of the adoption of processes and means and products within the board industry itself which have arisen out of their development and work that has been carried on during this period when we have been a licensee.

We paid a very high royalty over the years under these license agreements, all of interests have. That high royalty was justified, in my opinion—and I could be wrong—but I

feel it was justified only because there were two problems here: One, U.S.G. had a great policing job to do under this agreement, prices, terms, and conditions of sale, and so forth; secondly, it was a matter of common acceptance among the agents—and I feel it was justified, both by the statements of the representatives of U.S.G. and by their [fol. 577] conduct under this license agreement—that this was a patent umbrella under which for the payment of these license fees, which ran into the millions, together with other money which U.S.G. contributed, there was a laboratory and research program available to see that this industry was competitive with every type of material that might be in competition with the gypsum industry.

And over all those years U.S.G. has not made a single change that was for the better and would have a better product and would secure more customers and better serve the public, has not adopted a single plan or program, as far as we know, that it has not notified its licensees and made those processes available.

Now, under the terms of those license agreements—and I want to be quite certain about that, so there will be no misunderstanding on the part of any of those connected with U.S.G. as to my position—under those license agreements there was no binding, valid, legal, enforceable obligation for U.S.G. to make anything that it developed available to these licensees over and beyond improvements in the thing that was covered by the several original license agreements.

But by its course of conduct it has gone far beyond it. It is the position of my client and, I think, all of the licensees in the industry that they have been living through all these years when they have been paying these license fees under the assurance that we were going to stay competitive in this [fol. 578] industry. Perforated came out, it was made available; metalized came out, it was made available; several other matters which were not made the subject of formal license agreements, were covered by patents of U.S.G., and have been adopted and used in the industry without objection and without additional royalty fees being paid in some of those instances.

Now, I feel quite strongly that the provision of the Government's decree which provides that these licensees should be protected, not only under the patents which have hereto-

fore been taken out and under which they have been operating and the improvements which are covered by it, but the newer things, if any, that may come out within a reasonable period of time.

If the whole character of this industry is to change, we are going to have a lack of standardization of product, then there ought to be some period of time in which they can stay competitive until each company can build up its own research department and go its own way knowing that there is not going to be standardization.

Today in the building industry there is a very rigid degree of standardization. Government specifications, architects' specifications, all over the country, dealers understand what we are talking about when we talk about various types of synthetic building materials. It has had a great advantage because of the testings that have gone on in the laboratories over the country.

[fol. 579] As to the comparison of one material with another, where they are standard, you can get fair comparisons. I think it has been in the public interest and for the public good, but I feel quite strongly that we cannot, within the limitations of time and convenience of this court, get this whole thing buttoned up; whereas, in the Masonite case there could be handed up something that everyone had agreed upon. There must be a period of time within which to try to settle these things.

If they cannot be settled—and I am frank to say I think perhaps we never will be in complete accord without some help from this court—I think there ought to be that interim period, and I think the solution which the Government has presented, which I have seen again and again in the decrees in the anti-trust cases and I have never heard them criticized before, are perfectly proper provisions.

I think what we are asking for U.S.G. itself, were it in our position, would feel it was thoroughly justified in asking for that protection. If we can have the Government's decree, we can sit around the table and try to agree on those license agreements and bring them in. If we cannot agree, we can bring them in showing the only points of disagreement some time in the fall. In the meantime, we will have gone ahead as we have in the past.

Judge Jackson: You mean, Mr. Dallstream, that it is possible for the defendants and the Government to get together [fol. 580] on a decree as you did in the Masonite case?

Mr. Dallstream: I am not talking about a decree, I am talking about terms of the license.

Judge Jackson: I see. Go ahead.

Mr. Dallstream: I think, though, we are going to have to find some way when we all get around together—we will never do it by United States Gypsum first talking to one licensee and then to another and then one licensee meeting another one on the street and talking about it. You have finally got to sit around the table and get some finality and conclusion about it.

Chief Judge Stephens: You are satisfied, Mr. Dallstream, that Section Number VI of the Government's proposed decree——

Mr. Dallstream: I have taken the liberty today to take this sheet which Mr. Connelly so kindly gave us and putting in box form the views which I had and which I understand are concurred in by all of the agents or all of the licensees.

If the court would like, I would be very glad to see that those are prepared in sufficient numbers for everyone and hand it up, but I could briefly summarize them if I am not encroaching on the time of the court.

Judge Jackson: Well, I think it might have a good effect to have a visual presentation before us as well as by hearing.

Mr. Dallstream: I think Mr. Wanlass could prepare them by tomorrow.

Chief Judge Stephens: You had better hand each of us a [fol. 581] copy by tomorrow, but explain them now.

Mr. Dallstream: I will do it very quickly and the reporter, of course, will take it down.

We feel on Section I of the decree, the jurisdictional section, the statement of the Government should be adopted.

On Article II, which is the definitions, we feel that the United States Gypsum definitions are adequate and are fair.

On III we feel that the statement that is contained in the U. S. Gypsum suggestion is fair and should be adopted.

At IV, which United States Gypsum has left out altogether and has gone back over to page 7 and shown it lined up with VII of the Government, we would like to suggest that in lieu of either, the Article VII of the Government

and Article IV of U.S. Gypsum, that a new Article IV reading in exactly the language of the Masonite case be entered, which would read as follows:

> "That each of the license agreements listed in Article II hereof is adjudged unlawful under the antitrust laws of the United States and is illegal, null, and void."

Chief Judge Stephens: You suggest that in place of Article VII of the Government?

Mr. Dallstream: Of the Government and Article IV of United States Gypsum.

Chief Judge Stephens: Yes.

Mr. Dallstream: I agree with Mr. Finck that we cannot [fol. 582] dodge the fact that whatever interpretation should be put on the Supreme Court's decision, the majority of this court have decided that the mere plurality of licenses, accompanied by the other features that existed in this case, made those agreements illegal and that, being illegal, they are unenforceable and are null and void.

Now, we are faced with the dilemma: What are we going to do about it? We have got to have some new ones if we are going to be fair to the industry, to these licensees, the public, and to all concerned; and so, some provision must be made, and we think V and VI take care of that, and if we declare them null and void for these reasons, which have been recited in the previous paragraph of this decree, that we have taken care of the situation.

In order that United States Gypsum will have no misunderstanding of my position, I want them to know that my suggestion is in no sense based on any hope or desire on my part to get out of any license fees during any interim period, and if we can agree upon an appropriate license agreement, as far as my client is concerned, we are willing to let the royalty rate, whatever it is, agreed upon apply back to the time when we ceased paying royalties. I just want to make it clear to all that we are not attempting by this declaration of illegality of them to find some way of avoiding the license fees which during this none of us have paid.

[fol. 583] Mr. Spray: You said V and VI. You mean VI and VII?

Mr. Dallstream: VI and VII, yes, I am sorry.

Now, we think that V of United States Gypsum suggestions should take the place of the Government's V.

We approve of the Government's suggestion for VI and VII, except that we think the words "gypsum products" should be changed to "gypsum board," because we think it would be unfair to have those provisions apply to the products that were not involved in this litigation.

We have seen no reason whatever why Section VIII should be retained, as I think everyone has criticized it. I particularly feel that that section should have no application to our own company, Celotex.

We think IX, likewise, deals with matters which were in no way involved in the case.

[fol. 584] Chief Judge Stephens: Going back to 6, you suggested that "gypsum products" should be changed to "gypsum board."

Mr. Dallstream: Yes, sir.

Chief Judge Stephens: Do you also or do you not suggest that "each applicant" is a proper term? Do you think the decree should require every applicant to be granted a non-exclusive license or only the present licensees?

Mr. Dallstream: I do not think it is too important one way or the other. I do not think there has been any clamoring for anybody to get into the gypsum business. I think most of the deposits that are in competitive territory have been pretty well taken care of.

I do not think as a practical matter that anybody is going out and try to take the tag ends of marginal gypsum lands and try to get into the gypsum business. I do not care particularly. It is not a problem that affects me. I cannot see any basis in this decree for punishing United States Gypsum for something they did in good faith. I think you have to do justice to these licensees, but I do not see you need to go out and punish them by inviting the world to come in and use their patents on the basis of alleged misuse to the same degree that you might if there had been much more severe acts subject to criticism than appear in this case.

Chief Judge Stephens: I see your position.

Mr. Dallstream: The other matter than I want to prod up [fol. 585] before I conclude is with reference to Article X.

Article X in paragraph 1 provides that all of these defendants are restrained and enjoined from acquiring, purchasing, acquiring and holding, or acquiring and controlling, directly or indirectly, the business or assets or capital stock or bonds of any other defendant herein.

I do not think there is anything in this case that has ever touched upon the question of acquisitions of property, holdings, that indicated that anyone has done anything wrong about trying to enlarge their place in the gypsum field. I particularly feel that it would be improper to have that provision in the decree as applying to the Celotex Corporation.

We have never bought a competing plant, we have never done anything that would indicate we want to violate the anti-trust laws or create a monopoly. With the present status of the gypsum business, we could not create a monopoly if we wanted to. We are not competitive in many of the territories. If we ever do find that we are able to find another gypsum mine some place where we can have a little better part and afford more competition to the strongly entrenched units in the industry, it certainly would not be anti-social or violative of the purposes of the anti-trust laws.

I assume that Mr. Connelly has so fully presented the other criticisms of that particular provision that the court may well feel it should not be included, but I do feel that in [fol. 586] view of the fact that we have never had our day in court—and we are willing to have it any time, if there is anything the Government wishes to charge us with that is pertinent to this matter—that there should be inserted in the fourth line after the word "from," the words "hereafter——

Chief Judge Stephens: Fourth line after the word "from"?

Mr. Dallstream: Yes. —"enjoined and restrained from hereafter acquiring" and so forth. In other words, this decree should speak in futuro and leave whatever is in the past still a matter that is undisposed of by this decree, and we certainly could not agree to a decree which perhaps might possibly be construed or claimed to be susceptible of construction that this court had in some manner gone into the question of our purchase of the Gloyd property and had

passed on that issue, because you have not even heard about it yet, as far as the record is concerned.

I think that fully expresses my views, except the fact that I wanted to again call the court's attention to the fact that the language of four, which I suggest was taken directly from the Masonite case, which reads as follows: "That each of the following agency agreements," and so forth, "is adjudged unlawful under the anti-trust laws of the United States, is illegal, null, and void."

I think that disposes of all the problems and the confusion which Mr. Finck and others have been laboring under. [fol. 587] I do not think any of us want to do anything that is improper as far as our past royalties are concerned, once that matter has been determined and license agreements have been taken care of, and we ought to have this thing either fish or fowl.

The court ought to either determine they are going to uphold these agreements and only strike at the clauses that are in them and knock them out or else we ought to say it goes to the whole agreement because it is inseparable. I know that the Government in every case I have been connected with felt there was only one way to cure these things, and that was to strike down the whole agreement and have the court start fresh with something that was all right from the start under which they could live.

Judge Garrett: I understood you to agree to the suggestion that future contracts should be enjoined.

Mr. Dallstream: I did not understand, sir, that I made any reference whatever to that. What particular section were you referring to, sir?

Judge Garrett: In the last few moments. Probably I misunderstood you. That is why I am asking the question.

Mr. Dallstream: I think, sir, I was referring at the time to the provisions of section 1 of Article VII, which prohibited any of the companies from acquiring any property or stock of any other company.

Judge Jackson: Is that Article VII?

[fol. 588] Mr. Dallstream: Article X.

Judge Garrett: What was the suggestion, then, with respect to the future in that? You say in the future——

Mr. Dallstream: I said if you were going to leave approval of that clause, which the Government suggests, section 1 of

Article X, then in any event, it should be made clear that this decree is speaking prospectively in view of the word "holding", which is contained in it, and that the word "hereafter" should be included.

Judge Jackson: Did you suggest that "hereafter" come between the word "from" and the "acquiring"?

Mr. Dallstream: Yes, sir.

Judge Jackson: That is what I thought.

Mr. Dallstream: I want the court to fully understand I think the entire provision should come out——

Judge Jackson: Oh, yes.

Mr. Dallstream: But if the court should not agree with me, I think we should at least have that clarification, because I want neither advantage nor favor from the Government on that, except I want my say in court if we are ever going to talk about it.

Chief Judge Stephens: Mr. Rippey, for Ebsary.

[fol. 589] ARGUMENT OF BEHALF OF DEFENDANTS EBSARY GYPSUM COMPANY AND FREDERICK G. EBSARY

By Mr. Rippey:

Mr. Rippey: May it please the court, most of the points have been pretty well discussed pro and con so far. I will not labor the court with going over many of them, but there are some points which I should like to bring out in behalf of the Ebsary Gypsum Company.

In the first place, we feel that new findings of fact are absolutely unnecessary in the case. Findings have been made, and the record as it now stands with the decision of the Supreme Court and with the decision on the motion for summary judgment is sufficient to support any decree which may be made now.

With respect to the license agreements, we feel that they should be cancelled in their entirety, not parts of them. The bargain that was made by the licensees—at least, by the Ebsary Company—was with respect to all of the provisions of the whole. If the court were to strike out some, it would amount to making over the agreement, which the defendants

made, and the contract as a whole was the bargain, not in parts.

The Government has included in many instances references to the individual defendants in respect to the injunctive provisions. We feel those should be eliminated completely. The individuals being the presidents of the com- [fol. 590] panies, were acting in behalf of the companies as agents, and the parties to all of the dealings were the corporations, not the individuals. The Government might just as well have named the vice presidents or secretaries or managing agents as well as the presidents.

Now, the provision with reference to the basing point should be also eliminated completely. That was no part of the case and, as a matter of fact, it is surrounded with some confusion at the present time, with Congress attempting to straighten it out in some measure.

As to proposed paragraph 8 of the Government's decree, we believe that that should be stricken out completely. It is a matter of bargaining with a customer in each case, at least in the case of the Ebsary Company, the bargain that is made or the order that is obtained is accepted by the company and they make their own agreement with the proposed purchaser.

It has happened that in instances they have been overstocked with some type of material and they have, perhaps, made a requirement that they would sell a product on condition that some of the other was taken off their hands. I think that is perfectly fair. Any bargain they would like to make of that nature should be permitted.

As to paragraph 10 of the proposed decree of the Government, that, we believe, should be eliminated completely. It is noticed that in paragraph 2 and 3 under X there is a reference to application or notice to the Attorney General. [fol. 591] However, under paragraph 1 no such reference is made. It is possible in the future, in view of the fact that this decree will be quite permanent, that any of the individual defendants may either want to sell part of their stock or the companies may want to sell to some one else. If they are unable to sell to other defendants, that restricts, of course, the possibilities.

It is also conceivable that if permission were to be required to make any such transfer of securities or sale, it

might be denied entirely. Then, if the defendant did not want to continue in business, the only alternative would be to liquidate rather than to sell. We believe that the proposed Article X should be completely eliminated.

Now, as to the question of costs, it was I who suggested the ratable division of costs between the defendants in the first instance in my memorandum which I filed. The Government claims that no costs could be awarded against it. I think that proposition is academic because we feel that no costs should be awarded against anyone in this case in view of the good faith of the defendants. That means as the expenses and costs now stand, each side would bear his own.

As between the defendants, the Ebsary Company being one of the smaller in size, it will be bearing a larger proportion—well, the same proportion of costs, but larger in comparison with the business done.

I have suggested in my memorandum that some ratable [fol. 592] division be made on the basis of business done in the year 1939.

Chief Judge Stephens: I remember your memorandum now. I got the impression that that was suggested and I am glad you are addressing yourself to that. How can we find out about the business done?

Mr. Rippey: That is already before the court in the year 1939, for example, and for convenience I think that is listed in the——

Chief Judge Stephens: Why do you take that year?

Mr. Rippey: That happens to be listed in the Government's proposed findings of fact. It does not mean that year, no preference for that year against any other year, except that happened to be brought out in the testimony pretty much. For convenience it is set out here. I do not approve of the findings of fact proposed by the Government, but for convenience it is set out here, for that year.

Chief Judge Stephens: In your memorandum?

Mr. Rippey: No, the year 1939 is referred to in my memorandum, but in the proposed findings of the Government the proportion of business done in 1939 is set out.

Chief Judge Stephens: Where is that?

Mr. Rippey: That is under section designated 1 on page 2.

Chief Judge Stephens: Proposed findings?

Mr. Rippey: Yes, sir.

[fol. 593] Chief Judge Stephens: You mean subdivision 4?

Mr. Rippey: It is on page 2, headed "Paragraph 1. The defendants" and then there are several paragraphs under that.

Chief Judge Stephens: What part of that contains the estimate of the amount of business done by each in the year 1939?

Mr. Rippey: Paragraph 2, for example, refers to the United States Gypsum Company, and paragraph 4 states that that company produced and sold approximately 55 percent of all gypsum board and a substantial amount of all plaster sold in the eastern area.

Chief Judge Stephens: I see what you mean.

Mr. Rippey: Paragraph 5 refers to the defendant National and states 23 percent of board, 20 percent of all plaster, and so on for the rest of the defendants.

Chief Judge Stephens: I see. You suggest that each party be allowed to bear its own costs—that is, the defendants and Government speaking collectively—but that among the defendants the court should direct that the defendants should apportion the costs among themselves on the basis of the amount of business done in that given year?

Mr. Rippey: I do suggest that. Now, there is also a suggestion shown in the footnote to the slip opinion of the United States Supreme Court on page 5, called Footnote 1, and it names the several companies and it gives the sales of board in the eastern area in 1939.

[fol. 594] Chief Judge Stephens: What page?

Mr. Rippey: Page 5.

Chief Judge Stephens: I think our opinion in the case also has some reference to that, does it not, in the statement of undisputed facts?

Mr. Rippey: I think it does.

Chief Judge Stephens: Proceed, Mr. Rippey.

Mr. Rippey: With reference to the future and the use of patents, the Ebsary Company will need to have available some one or more of the patents it has been using, because it is presently operating under one or more of the patents and its facilities are arranged for that.

So a reasonable period will be necessary to work out a license agreement, we feel, which would be satisfactory; and

paragraphs 6 and 7 of the Government's proposal appear to be satisfactory to us, except for the elimination of the reference to gypsum products, and it should be confined to gypsum board.

I feel that a reasonable arrangement can be worked out under those provisions.

Chief Judge Stephens: Mr. Rippey, may I ask you about an administrative matter? The rules of the District Court require any party to a suit in its jurisdiction within ten days after filing a complaint or answer to designate some local counsel with whom the court may deal where the general counsel for the company is not located in the district. [fol. 595] I believe you have no local counsel designated here.

Mr. Rippey: No, that is correct.

Chief Judge Stephens: Would you object to designating someone? It is a great convenience. The purpose of that rule is to give the court someone that it can conveniently deal with quickly in respect to matters which need to be brought to the attention of counsel, especially administrative matters. In this case, for example, where there are so many companies involved and who all have general counsel living elsewhere, the convenience of the court would be greatly disturbed if we could not have someone here with whom we can deal in matters of continuances and setting of dates, and things of that sort.

Mr. Rippey: I, of course, am perfectly willing to go along, but under the circumstances I would like to consult with the Ebsary plant.

Chief Judge Stephens: I am not suggesting you make an immediate designation. I assure you I am not trying to draw up trade for the local bar. I have in mind the convenience of the court and the convenience of the parties to the case.

Next is Mr. Johnston.

ARGUMENT ON BEHALF OF DEFENDANT SAMUEL M. GLOYD

By Mr. Johnston:

Mr. Johnston: Gentlemen of the court, I hardly believe that I ought to be here, and I hope I will not be much longer.

Chief Judge Stephens: You made a tremendous effort to [fol. 596] get here, Mr. Johnston, and you certainly deserve to be here.

Mr. Johnston: Mr. Gloyd, as the court knows, is on record as retired from this business soon after we concluded the argument on the motion to dismiss. His health and age were such that it became necessary to dispose of that business.

Now, I am here primarily to see if the Government is now ready to dismiss as to Mr. Gloyd. A judgment here would be of no force against him. He is not in business, he never will be in business again, and that has been brought up many times during the trial of this case. In fact, in the early stages of the trial we were promised a dismissal, not by this counsel but by other counsel representing the Government. All of that is in the record.

I am just pausing now to see what the attitude of the Government would be about dismissing as to Mr. Gloyd. I really want it on the record some way because I do not know what to do until I know the Government's attitude.

Mr. Steffen: I want to say that it has not been a matter of record, as I gathered from the talk this afternoon, that the Texas Company has sold out to Celotex Company; but, assuming that that is true, Mr. Knuff and I would still be without power to grant a dismissal at this point.

We would be glad to take it up with our superiors and find out what the attitude would be.

Mr. Johnston: Now, that being the position of the Gov- [fol. 597] ernment, I then ask that no decree be entered here affecting in any manner that sale.

Chief Judge Stephens: Affecting in any manner what?

Mr. Johnston: Affecting in any manner the sale of the Gloyd properties to Celotex. The way that is drawn it could be so interpreted.

Chief Judge Stephens: Will the insertion of the word "hereafter," as requested by Mr. Dallstream, I believe, protect you?

Mr. Johnston: Well, it may. I was thinking of something else when he was saying that. It may also correct the next thing that I am asking.

Mr. Gloyd's funds are being invested from time to time in stocks. I think at the moment his estate owns some

stock in U. S. Gypsum. I know he has at different times. I would not like to see a decree entered that would in any manner affect the right to buy and sell stocks as an investment in U. S. Gypsum or any of these other concerns.

Now, we joined in the memorandum and exhibits filed by U. S. Gypsum, so I need say nothing about that, because we just did that to be of record, and having no interest in the business any more, I did not enter into a study of these various things that were discussed. We would just like to be dismissed and sent home out of this case.

Chief Judge Stephens: Mr. Johnston, is there some way in [fol. 598] which you can put of record that there has been a disposition of all the property, disposition of the business which has been known in this case as that of the Texas Plaster Company? Could you stipulate to satisfy the Government counsel that there has been such a sale so it can be placed of record here so that the court will have some record basis for protecting you?

Mr. Johnston: It has been in the record four or five times. I believe Mr. Dallstream and I could stipulate. Do you know when it was sold, 1943 or 1944?

Mr. Dallstream: My recollection is it was in 1945, sir. I do not think that is too important. At any rate, it was some time ago, and there is no question but what Mr. Gloyd has been out of business, he is a very elderly man and will never enter business again. I certainly feel that there would be no possible reason for keeping him in this case for any purpose whatever of the Government.

Mr. Johnston: May the record show that in 1944 or 1945 all of the Gloyd properties known as the Texas Cement Plaster Company were sold to the Celotex Corporation. He retired from business at that time and, in fact, has retired from all business. He is a very elderly and feeble man and will not be in any kind of business again.

Judge Garrett: Up to that time to which you refer he was operating as an individual?

Mr. Johnston: Yes.

[fol. 599] Judge Garrett: Not as a corporation?

Mr. Johnston: No.

Judge Garrett: The Texas Company itself was not a corporation or was it?

Mr. Johnston: Up to about 1926 or 1927 the Texas Cement Plaster Company was a corporation. Mr. Gloyd owned and controlled all of the stock. He dissolved it, and from that time on he operated as an individual under the trade name Texas Cement Plaster Company.

Chief Judge Stephens: That was made clear throughout the trial of this case.

Mr. Johnston: That is in the record.

Judge Garrett: That was my recollection of it, and I wanted it refreshed. Very well.

Chief Judge Stephens: Is the Government willing to accept that statement as correct?

Mr. Knuff: We do not know anything about it, Your Honor.

Chief Judge Stephens: Very well.

Judge Garrett: Have you read the record?

Mr. Knuff: Have I read the record?

Judge Garrett: On that phase of it, the sale.

Mr. Knuff: All we understand is that there has been a sale.

Judge Jackson: Anything in the record stating that?

Mr. Knuff: No.

Chief Judge Stephens: Nothing in the record on it.

[fol. 600] Judge Jackson: Except what Mr. Johnston just said now.

Mr. Knuff: That is right.

Mr. Johnston: If my memory serves me right, the last session I attended counsel here for the Government made the statement—and it is in the record—to the effect that he wanted it understood that they were not accepting the sale from Gloyd to Celotex, and we would probably hear from that later. So this is not the first time counsel has heard about it.

Any further questions, Your Honor?

Chief Judge Stephens: Thank you, Mr. Johnston.

Mr. DeWitt for Newark

ARGUMENT ON BEHALF OF DEFENDANT NEWARK PLASTER COMPANY

By Mr. DeWitt:

Mr. DeWitt: If the court please, I am here on behalf of the defendant Newark Plaster Company to urge that two

provisions be incorporated in any decree that be made by this court and that there be any modification necessary with respect to any other provisions insofar as such modifications may be necessary to avoid any inconsistency between those other provisions and the two provisions to which I shall especially address myself.

The first provision which Newark Plaster Company believes should be incorporated in any decree is a provision which will state in no uncertain language that the license agreements, as they now exist, are invalid, null, and void. [fol. 601] The second provision which we think should be incorporated is a provision substantially in the form of Section VI of the proposed Government decree, under which Newark Plaster Company as a licensee would have the right to obtain from U. S. Gypsum Company a license under the several patents that now exist and under such improvement patents as may issue in the future.

Now, addressing myself first to the first of these two provisions—namely, that the decree should incorporate a provision which states clearly that these license agreements are invalid—I think, in the first place, that the language of the opinion of the Supreme Court clearly indicates that the Supreme Court was not of the opinion that the only illegal portions of these license agreements were the price fixing provisions.

It seems to me clear from the language of the opinion of the Supreme Court that the Supreme Court was of the opinion that the license agreements were invalid as a whole.

Now, if Your Honors will turn to page 23 of the slip opinion, about the middle of the page, Your Honors will find the following language:

> "The licensor was to fix minimum prices binding both on itself and its licensees; royalty was to be measured by percentage of the value of all gypsum products, patented or unpatented"—that certainly has nothing to do with price fixing—"the license could not be transferred without the licensor's consent"—that has nothing to [fol. 602] do with price fixing—"the licensee opened its books of accounts to the licensor" that has nothing to do with price fixing—"the licensee was protected

against competition with more favorable licenses and there was a cancellation clause for failure to live up to the arrangements."

Now, if the court will turn to page 27, the court will find at the middle of the page this language:

"The license agreements and the bulletins establish the conspiracy of the licensor and each licensee to violate the Sherman Act."

And on page 31 at the top of the page:

"The provision in the license contracts that royalties should be paid on the production of unpatented board is strongly indicative of an agreement not to manufacture unpatented board," which has nothing to do with price fixing.

On page 34, the court said:

"The defendants did undertake to control prices and distribution in gypsum board."

So that it seems to me a reading of the opinion of the Supreme Court must indicate that the Supreme Court did not contemplate that this court would try to winnow out the wheat from the chaff and decide which of the provisions of existing license agreements are valid and which are [fol. 603] invalid. It seems to me that the Supreme Court clearly was of the opinion that the agreements as a whole are invalid.

Now, that is not merely an argument made for the sake of making the argument as an academic enterprise. I think it has practical implications because, when we come to negotiate new license agreements, if this court should attempt to separate price fixing provisions as illegal from other provisions which are legal, we will be met in the negotiation of new contracts with the contention that provisions in the existing contracts which are not clearly price fixing provisions have the blessing of this court and may be included in a new contract.

We do not want to become involved in discussions of that kind and, therefore, think that we ought to finish with the existing contracts and negotiate new contracts anew.

Now, for example, if this court takes the position that only price fixing provisions are condemned, then what are we to say as to the provision in the existing contracts to the effect that royalties are to be payable whether the patents are used or not?

What shall we answer when we are asked to include that provision in a new contract and are met with the contention that this court has put its blessing on that—at any rate, has not clearly held that portion of the existing license agreement invalid.

What are we to say when we are confronted with the [fol. 604] proposition that this court has inferentially put the blessing on a provision to the effect that there may be an inspection of our books, a provision which is included in the present contract?

Moreover, these price provisions in the existing contract are so inextricably intertwined with other provisions that if we were to attempt to negotiate new contracts to separate one from the other, we would become involved in endless argument.

Finally, a final reason why this provision should be included in any decree that is entered is furnished by the example of the Masonite case where, as Your Honors have already been informed, the decree expressly provided that the agreements were null and void.

Judge Jackson: And that meets your standard of being unequivocal and clear, does it?

Mr. DeWitt: It does. So, for those three reasons we think that this court should, without equivocation, find in its decree that these license agreements are invalid: namely, the Supreme Court so indicates, practical considerations argue for it, and we have the example of the decree in the Masonite case, which everybody agrees is very closely similar to the present situation.

Now, if this court does not agree with my argument thus far, then I think this court should eliminate any ambiguity in the situation by expressly finding that the only provisions [fol. 605] of these contracts that are invalid are the price fixing provisions.

I do not see, with all respect to the court, how the court could include such a provision in the decree, but it seems to me that we ought not to fall down between two stools. We

ought to have some pronouncement by the court in the decree with reference to these existing license agreements. If this court thinks that these license agreements are valid, excising the price fixing provisions, the decree should so state. If not, if the court agrees that under the language of the Supreme Court, these license agreements are invalid, the decree should so state.

Chief Judge Stephens: Let me ask you this about your first point. As I understood it on the motion for summary judgment, my colleagues decided to grant the motion for summary judgment on the ground that the Supreme Court had decided that in their plurality of licenses with price fixing provisions, industry-wide, adhered to by the parties, was illegal.

I had assumed, then, that this court would enter a decree which would limit it to such a decision as that. If it goes farther and strikes down all the terms of the licenses other than the price fixing provisions, will it not have entered a decree which in that aspect will have denied the defendants the right to their day in court as to the legality of those other provisions?

Mr. DeWitt: I do not think so. To answer Your Honor's [fol. 606] question, I do not think so. It seems to me that if the existing license agreements are to be condemned because they have price fixing provisions in them, it inevitably results in that the other provisions which, if found in another context might valid, are tainted with the illegality of the price fixing provisions.

I do not think you can draw the line. I think it is like a fluid which permeates the entire agreement. This court by finding, following the Supreme Court decision, that these price fixing provisions were illegal, of necessity found that the agreements were illegal.

Chief Judge Stephens: What becomes, then, of the Supreme Court's statement that a prima facie case of illegality had been established with respect to these matters? Why did the Supreme Court then send the case back for further proceeding? Why did not it enter a summary judgment or order one entered closing the whole case?

Mr. DeWitt: I wish I had the wisdom and the knowledge to interpret to Your Honor the reasoning processes of the

United States Supreme Court. In all humility, I have not, and I, therefore, must respectfully beg to be excused from answering your question directly.

Judge Jackson: Well, it will probably have an opportunity to clarify what it said. Whichever way this goes, they will get another whack at it.

[fol. 607] Mr. DeWitt: I do think we become involved, if I may say so, in very technical—I was going to say quibbling, when we try to torment the language of the Supreme Court and the distinction between the prima facie case and summary judgment and all that. It seems to me, reading the opinion of the Supreme Court just as it stands, that it is perfectly clear that the Supreme Court took the position that these agreements were invalid and I suppose, as a matter of technical procedure, having before it a judgment on a motion to dismiss, they had to send it back with directions that the defense be given a chance to put in a case. I should think that would be automatic.

They had a motion to dismiss. This court granted the motion to dismiss. Now, they sent it back and as a matter of form they had to say that the defense should put in any case that it had.

I do not think they needed to go beyond that. If the court had been asked the question which Your Honor addressed to me, I think, perhaps, that would have been the answer the court would have made.

Chief Judge Stephens: Very well. Proceed.

Mr. DeWitt: Have I answered Your Honor's question?

Chief Judge Stephens: You have done the best you can within the limits of your "humility."

Mr. DeWitt: Now, equally important to us are the provisions with respect to the granting of licenses under the [fol. 608] existing patents and under future patents.

As Daniel Webster said of Dartmouth College, "We are a small company, but there are those that love it"; and if the purpose of all this litigation, through which we have been laundering for many years, is to promote competition, certainly this court ought to have some concern for the protection of the smaller companies from elimination which would result in a concentration of business under the larger companies and defeat the very purpose of the litigation.

We, therefore, think that something substantially like the provisions of the Government's proposed decree, Section VI, should be incorporated in any decree.

Now, in that connection we would make clearer than it is now made that under the decree we are to have the opportunity to have a separate license under each patent or each group of patents relating to the same procedure.

I make that point because under the proposed forms of license agreement, which were submitted to us within the last ten days by United States Gypsum Company, there are combined in one proposed agreement a license under the bubble patent and a license under the perforated lath patent; so that if we did not use the perforated lath but use the other, we would have to pay a royalty and, conversely, if we used the other and did not use the perforated lath, we would have to. We ought not to have to pay a royalty based upon a use of two when we merely want to use [fol. 609] one.

I think it is clear in the Government's provision and, if not, it should be from our point of view, that we are to have the opportunity to take licenses not only under the existing patents, but under any improvement patents. If that is not done, just as a matter of plain common sense, and there is an improvement patent which revolutionizes the industry, the competitive position of the company that I represent will be such that it will practically be forced out of business and you will have accomplished a result directly the opposite from what the Government has been trying to accomplish.

Now, I think, too, that it is necessary that there be included in this provision a provision under which the Government is to act as the arbiter. Personally, we get along all right with those who represent United States Gypsum Company, but I do think there will be questions which perhaps cannot be solved without recourse to some third party. It seems to me that much as this court may wish to avoid the responsibility, that there is no other agency to which we can turn.

Judge Garrett: Oh, yes. The Supreme Court of the United States would make a very fair agency in that regard.

Mr. DeWitt: We would be very glad to adopt them if Your Honors will so direct in the decree.

Chief Judge Stephens: I think you will want to correct your record in one place. You misspoke and said you thought [fol. 610] the Government ought to be made the arbiter. You meant the court.

Mr. DeWitt: I meant the court.

Judge Jackson: You did not mean this particular court composed of these three particular men, did you?

Mr. DeWitt: I would be very glad to suggest that it be this particular court.

Judge Jackson: We may be scattered abroad, you know, by the time you are in difficulty.

Mr. DeWitt: I think Your Honors will have no difficulty in selecting the appropriate agency if you agree on the principle.

There are a number of provisions that I might mention, speculating upon the possibility of disagreement, but I think Your Honors can easily imagine that there will be difficulties other than questions of royalty which the parties may not be able to iron out.

[fol. 611] There ought to be some place to which the parties can turn to settle differences and come to a conclusion if the industry is going to go on.

Now, as to the other provisions I am not going to take up the time of the court because I am not prepared to discuss them in detail.

I repeat in conclusion what I said in the beginning, that for us it is vital that the decree include a provision taking an attitude squarely with regard to the validity or partial validity of these existing license agreements, either holding they are invalid, null and void, as in the Masonite case, or squarely stating that they are valid except for the price-fixing provisions; and that there be included the provision with respect to the future licenses, a separate license for each separate patent, as to existing and future patents; and that any other provisions in the decree inconsistent with those be modified so as to become consistent.

Mr. Johnston: If the court please, may I be indulged just one statement?

In view of the statement of counsel for the Government about this sale to Celotex, I would direct the court's atten-

tion to page 94 of the Government's memorandum. I read as follows from the seventh line:

> "In 1945, while this court had under consideration the defendants' motions to dismiss, Celotex, without [fol. 612] notice to the Government and without, as far as the Government knows, notice to this court, acquired the assets of Texas Cement Plaster Company."

Mr. Connelly: May it please the court, while the arguments that have just been made have emanated from counsel for the parties called defendants, I think it is reasonably clear that those arguments were directed specifically to a position adverse to that of the defendant United States Gypsum Company.

If Your Honors would grant me a few minutes to reply thereto—I realize you are anxious to close this proceeding promptly, but I should like those few moments, if I may.

Chief Judge Stephens: I think for the benefit of the court you ought to be allowed some time to reply, so we can get a clarification of the situation that apparently exists between the other defendants and U.S.G. But we will take our afternoon recess at the present time.

How long do you think you gentlemen for the Government will need to reply?

Mr. Knuff: Well, in view of my horrible estimate of yesterday, I would say someplace in the nature of three-quarters to an hour.

Judge Jackson: Don't you think you have said about everything you can possibly say with respect to the Government's contention?

Mr. Knuff: I have got to clarify something, Your Honor. [fol. 613] The waters have been muddied in this case, and I have got to clarify them.

Judge Jackson: Well, if you do not repeat what you said in your long argument yesterday, it will be all right. There is no sense in making zweiback out of this, you know.

Mr. Knuff: That is right.

(A short recess was taken.)

Chief Judge Stephens: Proceed, Mr. Connelly.

Further Argument on Behalf of Defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode

By Mr. Connelly:

Mr. Connelly: I take it from what has been said, if the court please, that the defendants, other than the defendant United States Gypsum Company, differ with the defendant for whom I appear in only one respect, and that is the provisions proposed to be made for the protection of present licensees of the United States Gypsum Company.

Now, much has been said in the course of these arguments which I have found somewhat difficult to follow. For example, the statement has been made on several occasions suggesting that the United States Gypsum Company has proposed that this court strike down only certain provisions of the existing license agreements, leaving the balance in effect.

That is certainly not what we have proposed. Our proposal in that respect appears at page 7 of the schedule, [fol. 614] Article IV of our form of decree, containing two short and simple paragraphs:

"1. The minimum price provisions of the patent licenses are hereby declared to be illegal.

"2. Each of the patent licenses is hereby canceled and terminated." In its entirety.

Judge Jackson: Could you read in there for that reason? Would you say, then, that that subsection 2 would mean each of the patent licenses hereby canceled and terminated because they contain minimum price provisions?

Mr. Connelly: That could be read in, sure.

Judge Jackson: It could be interpreted that way.

Mr. Connelly: It could be so interpreted.

Judge Jackson: I imagine that is what Mr. DeWitt and Mr. Dallstream probably have in mind.

Mr. Connelly: Well, if that is what they have in mind, of course, so far as what the Supreme Court has said on this subject, it has dealt precisely and specifically with price control under the present licenses and nothing the Supreme Court has said has had any bearing upon the issuance of patent licenses without price control.

But, however that may be, the provision that we propose would strike down the entire patent licenses, but there is certainly no holding and there could be no holding that other provisions of the license—that is to say, the provisions [fol. 615] granting them the right to manufacture, provisions with reference to payment of royalties, and so forth—those had simply not been before the court for decision, and no action had been taken on them.

Judge Jackson: And your stand would be this: That if and when the patent licenses are canceled and terminated, you would start from scratch on new patent licenses?

Mr. Connelly: Yes, sir. In other words, as I thought our proposal was clearly enough stated, it does not entail at least some of the possible objections or difficulties that some of the defendants' counsel apparently anticipate.

Now, I stated at the outset that we recognized the problem involved in that. In other words, that the licensees currently engaged in business, having engaged in the manufacture of patented board in reliance upon the licenses, should be protected. They ought to have on fair terms all of the rights under the U.S.G. patents which they have heretofore had; and it is the purpose and intention of United States Gypsum Company in making the proposals that it has to afford them all of those rights.

But I think in view of some of the things that have been said, I should make even more specific, if I can, just what it is that we have proposed as a way of handling this situation in the light of the court's decision.

That is Article VI of the U.S.G. form of decree, page 4 of the schedule. We cite:

[fol. 616] "In recognition of the fact that defendant companies other than defendant United States Gypsum Company, in their manufacture and sale of gypsum board, have relied upon their respective patent licenses to use the patents therein described, said defendant United States Company shall grant to each of the other defendant companies which shall apply therefor within 60 days from the date of this decree"—and I pause for a moment. 60 days does not have any special magic attached to it. It was in our view a reasonable period of time during which the defendant companies could determine whether they wished to have a license under these patents; if that period of time

is thought to be unreasonable in terms of shortness, of course, it can be extended in such form as the court may think proper. Continuing:

"—in lieu of any such patent license held by it, an indivisible and non-exclusive license, retroactive to the date of this decree"—pausing there a moment. In other words, affording them full protection whenever the patent license agreement shall ultimately be executed, it is retroactive to the date of this decree, so that at all times they are protected by licenses from any threat of infringement.

Chief Judge Stephens: So that the canceling of the present licenses and the going into effect of the new ones is coincidental?

Mr. Connelly: Yes, sir, even though the precise agreements themselves may not be formally signed until some period later on.

[fol. 617] In other words, the decree itself can deal with this situation. It can be entered now, but can leave, if anything required further consideration, matters incident to the form of the license agreements.

Then, to continue:

"—to make, use and vend gypsum board under any of the unexpired patents described in such patent license, upon royalties and other terms and conditions not less favorable to such other defendant company than those contained in such patent license, but without minimum price provisions." Stopping right there. The obvious purport of that provision is to insure that the defendant licensees shall have all of the rights which they now possess or which they possess under the present license agreements without limitation in any form whatever, and that, of course, without any minimum price provisions, which under the decision have been held to be illegal.

Now, the next sentence in that Article VI was suggested by us as merely a simple means of dealing with the machinery for providing approval of a form of license agreement. We recognize that there is a possibility that a form of license agreement which we might submit under that provision of the decree might not be acceptable in one form or another to any given licensee. Indeed, the Government

itself might have some objection to some particular provision or condition of the license agreement and, therefore, [fol. 618] we thought a simple way to handle it, to avoid any future controversy, is to provide in the decree itself that there shall be filed with the court a form of the proposed license agreement, that if there should be any objections to any portions of that, those could be ironed out, but that ultimately there will be on file a form of license agreement which is approved, and from there on in no mechanical problem being presented to this court by having applications being made from time to time concerning the meaning, interpretation, and effect of that provision.

Now, pursuant to the thought contained in that second sentence, that last sentence of Article VI, we have submitted the forms of license agreements which were handed up to the court yesterday. Those forms I should like to comment on just very briefly. There are three separate forms of agreement: One covering the general board patents, and those are four in number, three of them relating to board itself and one relating to perforated lath.

Let me say, before I move on to the next one, that this form of agreement has been presented to the licensees with the statement, the explicit statement, that of the list of four patents each licensee is at liberty to strike out any one, two, or three of them. In other words, the defendant United States Gypsum Company is offering to license under any one of the unexpired patents or any two or more that the individual licensee shall desire. If there should be any [fol. 619] difficulty, as was indicated in the comments made by the last speaker, desire to have a separate form of license agreement covering specifically the perforated lath patent, it is perfectly satisfactory. There is no objection on the part of U.S.G. to that point.

These four patents are the remaining patents covered in the so-called general license agreements which were in effect at the time this complaint was filed and that is the reason for their inclusion in the same license agreement just as they were before, but there is no reason why they should not be separated.

The other two forms, one for a metalized board, covering that patent, and the other for the so-called bundling patent, a method of packing. Under those agreements and under

that proposal, as I say, each licensee is at liberty to take a license under one or more, just as it shall elect.

The agreements provide for a royalty rate, a royalty rate which is precisely the same royalty rate in effect under the prior license agreements, with one exception, and that is that royalties are payable only on the patented product. In other words, royalties payable only to the extent that the licensee actually produces products embodying inventions covered by the licensed patents.

All of the price provisions, provisions relating to price control in prior agreements, have been eliminated. Indeed, every other provision, condition, or clause to which the [fol. 620] Government has expressed any objection has been eliminated from these forms of license agreements, with two exceptions, and they are very minor ones. In the Government's proposed decree, Article VI, paragraph 3, page 5 of the schedule, one of the conditions prescribed or purported to be prescribed by the Government is that the license must provide that the licensee may cancel the license at any time by giving 30 days' notice in writing to the licensor. That provision is not included in this form of license agreement, because there is no occasion for it in the view of the defendant United States Gypsum Company in a license which does not contain any price limitations, and to enter into any license agreement authorizing one party to cancel with 30 days' notice and not authorizing the other to cancel is a meaningless gesture.

The other provision referred to by the Government at the end of paragraph 3 is that a license agreement shall not contain any clause authorizing the inspection of licensees' books by the licensor. This form of license agreement does contain a provision authorizing inspection of the licensees' books in order to verify the accuracy of the payment of the royalties.

It also, however, contains a provision at the same spot that if any licensee shall object to inspection of its books by U.S.G., that inspection may be carried on by an outside independent auditor.

Chief Judge Stephens: Where is that provision with re- [fol. 621] spect to book inspection? I cannot seem to put my eye on it.

Mr. Connelly: With the Government's comments on it, that is the last sentence of paragraph 3 on page 5 of the schedule.

Chief Judge Stephens: I see.

Mr. Connelly: "Without limiting the generality of the foregoing"—in other words, it is our view that that is entirely proper and appropriate as a provision to include in a patent license, so that the patentee-licensor may be assured of receiving the royalties to which it is entitled under the license agreement.

Now, reference has been made to the fact that these forms of license agreement were submitted to the other defendants a week or ten days ago. That is quite true. But this represents a revision of a prior draft of proposed license agreement being prepared under the provisions of Article VI of our proposed decree, at the time our memorandum was filed back in March, and objections or comments or questions were invited from all of the licensees asking if there were provisions there to which anyone objected, and this document, copies of which have been handed to the court, represents a revision intended to meet any and all objections that any licensee might properly make to the proposed form of license.

I think it is significant that with the exception of the one statement by one licensee that he desired to have a separation of perforated lath from the other board patents, no one [fol. 622] of the counsel who has spoken with reference to this situation has raised any objection to any of the terms of these forms of proposed license agreement.

Now, under those circumstances the question naturally arises as to why all of the opposition to the solution to the problem suggested by the United States Gypsum Company? Well, the answer to that I think is perfectly clear, and the reason why those defendants express a desire for the proposal made by the Government as to compulsory licensing, is that in that proposal—that is Article VI, again, of the Government's proposed decree—defendant United States Gypsum Company is ordered, directed to grant a non-exclusive license to make, use, and vend under any, some, or all patents and patent applications now or hereafter owned or controlled by it.

That, really, it seems to me, gets the nub of the contro-

versy between the patentee, United States Gypsum Company, and the licensees.

In other words, those licensees are here in the position of attempting to obtain from this court something more than they have heretofore had by virtue of their license agreements.

In connection with the prior license agreements, United States Gypsum Company had a provision in there granting to the licensee rights under any improvements with reference to the patents licensed in specific terms and the proposed forms of license agreements contain exactly the same [fol. 623] provision with respect to improvements. This clause, however, is dealing with an entirely different subject. That is, any invention which may hereafter be made in the field by United States Gypsum Company or patent, which may be taken out or acquired by it, that under the Government's form of proposed decree, the United States Gypsum Company would be forced to grant a license to anyone that might apply for it, and that is modified by the defendants to say it must grant a license to the other persons who are now licensees.

I submit there is absolutely nothing in this case, either from the standpoint of the Government's objection and the decision in the case itself or from the standpoint of fair protection to licensees which justifies this court directing a confiscation of property of the United States Gypsum Company and a direction that it shall be compelled, whether or not it wishes to—that is beside the point, as to whether or not it would ultimately grant such license—asking the court now to direct that any time in the future, whenever it acquires a patent, that it shall issue a license to these defendants upon request and that is a provision to which United States Gypsum Company most strenuously and for reasons which I am sure the court will understand objects.

The time problem is a very unimportant one, it seems to me. The position of the United States Gypsum Company has been stated very clearly on that point. It will not con- [fol. 624] sent at this point to the granting of a license on any patents it may acquire in the future irrespective of what they are.

So far as anything else in the proposed form of license agreement, there is no reason indicated why those questions

or if there be any objections, why they could not be disposed of very promptly indeed.

Now, Mr. Finck made a statement, which I am sure was inadvertent, to the effect that my position in this case with reference to this question of compulsory licensing differed from my position in Line Material Company case. That happens not to be the fact.

It is quite true that in that case, as I pointed out to Your Honors, I did not represent the patentee. I represented one of the licensees.

It is also true, as I stated to Your Honors before, that in that case the patentee did not object to a compulsory licensing provision, and, of course, it was not for the licensee to take any position one way or the other, except that I did state to the court, both in my memorandum and in my oral argument in Milwaukee, that so far as the licensee that I represented was concerned, we saw no occasion under the facts of that case why any decree should contain a provision for compulsory licensing, but that since the question was one primarily affecting the patentee, I did not think it was up to me to make any comments one way or the other about it. [fol. 625] Since the patentee had consented, that was the end of it.

There was one other statement made to the effect, as I recall it, that the payment of royalties by the licensees in prior years was within some kind of understanding or arrangement designed to promote a general program of research to be carried on apparently by the United States Gypsum Company for the benefit of the industry as a whole.

I should like to make it clear that there is nothing in the record that I know of to support that suggestion, and it is not the fact, that there was any understanding of any nature that the royalties were for a general research program for the benefit of all parties.

They were payable for the privilege of using the patents included in the license agreements.

In our view the proposal that we have suggested in this form of decree covers every conceivable, legitimate interest of the licensee that is entitled to protection. It is, in our view, a completely fair and workable way of disposing of the problem, once the decision has been accepted, and that there is nothing in this case—I will not repeat my arguments in

that connection—to justify the granting of what I describe as the punitive relief sought by the Government against this defendant.

Chief Judge Stephens: Mr. Knuff.

[fol. 626] CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF

By Mr. Knuff:

Mr. Knuff: May it please the court, I want to at this time take up and clarify a point which, if it was clear before, certainly has been muddied by what has been said yesterday and today and, secondly, I want to discuss some of the provisions of the decree which the Government feels are absolutely necessary to restore competition in this industry.

If I understand the defendants' initial argument in this case—and I think I do—their argument is one to narrow the scope of this case in three respects:

First, they want to narrow the scope of this case as decided by the Supreme Court;

Second, they seek to narrow the scope of this case as decided by this court on the motion for summary judgment; and, hence,

Three, they thereby hope to limit the findings and the decree.

Counsel for U.S.G. said yesterday that the whole case is predicated upon the proposition that the conspiracy may be shown by establishing that the defendants entered into a plurality of licenses. Therefore, he argued that only a conspiracy to restrain trade is involved, not one covering Section II, the monopoly charge.

Furthermore, so he would argue, only patented board, not [fol. 627] gypsum products, is covered by the issue in this case. The issues in this case, if the court pleases, as presented throughout this trial, as presented on the motion for summary judgment—rather, motion to dismiss—as presented to the Supreme Court, and as presented on the motion for summary judgment, are defined by the pleadings

and by the evidence. The issue that is before this court and which was before the Supreme Court is that any combination of erstwhile competitors to enter into common price-fixing license agreements is illegal under the Sherman Act.

The Supreme Court by its reversal of Finding 118 affirmed that proposition. The Supreme Court said that there was a plan to blanket the industry under price-fixing license agreements and stabilize prices.

Counsel for U.S.G. stated yesterday at Transcript 8084, and I quote:

> "Secondly, the Supreme Court made certain statements as to the law applicable to the situation of a plurality of license agreements with price-fixing provisions, which this court held to be applicable to the admitted, undisputed facts in this case; and, on the basis of that, made its decision granting the motion for summary judgment."

He then stated on the same page that the law applicable to the situation of a plurality of licenses was based upon the holdings of the Supreme Court as set forth at pages 389 and 393 of the Supreme Court's opinion.

[fol. 628] At Transcript 8085 there is a quotation from page 389 of the Supreme Court opinion, reading:

> "We think that the industry-wide license agreements, entered into with knowledge on the part of licensor and licensees of the adherence of others, with the control over prices and methods of distribution through the agreements and the bulletins, were sufficient to establish a prima facie case of conspiracy."

He also quoted from page 393 of the opinion—and that appears at Transcript 8086——

Chief Judge Stephens: What transcript are you referring to?

Mr. Knuff: 8086 of the transcript.

Judge Jackson: Yesterday's proceeding.

Mr. Knuff: That is right, Your Honor.

Chief Judge Stephens: My page is 7966 to 8128.

Mr. Knuff: 8086 is correct in mine.

Chief Judge Stephens: I thought you said only 85.

Mr. Knuff: 8086. If I said anything else, I misspoke myself.

Chief Judge Stephens: Proceed.

Mr. Knuff: Quoting from the Supreme Court at 393:

> "The license agreements and the bulletins establish the conspiracy of the licensor and each licensee to violate the Sherman Act."

Now, note the context in which those statements appear. [fol. 629] Those statements appear under Point III of the Supreme Court's opinion. Point III of the Supreme Court's opinion does not propose to define the issue in this case.

Point III of the Supreme Court's opinion was discussing a preliminary question, and that question is: When is there a prima facie case showing an association of conspirators in a common plan or a common enterprise or having a common objective, so that the declarations and acts of each individual can be binding on the others?

The Supreme Court in that portion of its opinion was dealing with a preliminary question as to whether or not the declaration rule was to be applied. It did not purport to set the limits of its decision under that section.

The Supreme Court in order to determine whether or not the rule in Hitchman Coal & Coke v. Mitchell was to be applied, had to first determine whether we had shown an association of individuals with a common purpose to promote a common cause, legal or illegal, so that then the Supreme Court could read or not read the declarations as binding upon all.

I repeat the Supreme Court was not laying down the law of this case in Point III, and when they take those two passages, which they quoted yesterday, and say that that is the law of this case, that a plurality of licenses constitutes a conspiracy, they are taking that out of context. The context in which that was used was to determine whether or [fol. 630] not we had made out a prima facie conspiracy, for the purpose of applying the declaration rule.

The Supreme Court there pointed out at page 389 that each licensee was aware of U.S.G.'s intention to make the licenses industry-wide, that the licenses provided for price control, that the licensee was protected against competition with more favorable licenses.

The Court then said at page 389:

> "The District Court did not accept the foregoing facts as evidence of a conspiracy."

The Supreme Court did not say:

> "The District Court did not accept these facts as evidence of the conspiracy."

The Court then said:

> "These facts are proof of a conspiracy."

They said that in order to apply the declaration rule.

Chief Judge Stephens: Were they not talking about the conspiracy charge? The last sentence at the top of page 24 follows what you read, which again repeats the words "a conspiracy", and says:

> "Certainly they are overwhelming evidence of a plan of the licensors and licensees to fix prices and regulate operations in the gypsum board industry."

Mr. Knuff: No, Your Honor, I do not think that the Supreme Court was talking about anything in this section other than the application of the declaration rule. It starts out on page 388:

> [fol. 631] "The trial court ruled that on motion to dismiss pursuant to Rule 41 (b), the court should weigh the evidence and grant the motion if the Government failed to establish its case by a preponderance of the evidence, and the court further ruled," and so forth.

Then they say in the next paragraph:

> "We are unable to accept, however, the ruling of the court that declarations of each defendant were admissible only against the defendant making the declaration."

And then they point out the reasons why they cannot accept it. Then on 393 they say:

> "We think that all of the declarations and acts which we have set forth in this opinion are in aid of the ulti-

mate conspiracy. We do not attempt to fix a date when the conspiracy was first formed. At least, the declarations which we have quoted were made with the purpose of advancing a plan which ultimately eventuated in the licenses of 1929."

They start off Point III talking about the declaration rule, they end Point III talking about the declaration rule.

But in Point IV of the Supreme Court's opinion the Supreme Court did proceed to consider the whole case and considered whether in the light of all of the evidence, including the declarations, we had shown that the defendants associated themselves in a plan to blanket the industry and stabilize prices.

After reviewing, beginning on page 393, mentioning Inter-[fol. 632] state Circuit, mentioning specifically Finding 118, then continuing over on page 395, the Court said:

"The Government relied very largely on documentary exhibits, and called as witnesses many of the authors of the documents. Both on direct and cross-examination counsel were permitted to phrase their questions in extremely leading form, so that the import of the witnesses' testimony was conflicting. On cross-examination most of the witnesses denied that they had acted in concert in securing patent licenses or that they had agreed to do the things which were in fact done. Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involved mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous."

Now, if Finding Number 118 is erroneous, the correct finding is that the defendants did associate themselves in a plan to blanket the industry under patent license agreements and stabilize prices.

It follows that the motion which we presented last June was based upon this broad proposition that the defendants, being erstwhile competitors, entered into common price-

fixing license agreements for the purpose of organizing the [fol. 633] industry and stabilizing prices.

The plurality of licenses was not the conspiracy. The license agreements were only evidence of the conspiracy. The conspiracy in this case was the plan to blanket the industry under patent licenses and stabilize prices. That conspiracy, that plan was set forth in paragraph 45 (a) to (e) of our complaint.

Paragraph 45 charged the defendants with fixing prices on board, standardizing product, eliminating jobbers, attempting to fix the resale prices of manufacturing distributors, and attempting to fix the prices on unpatented gypsum products.

That is the conspiracy, not the plurality of licenses. And it is important that the court understands this. The plurality of licenses is not the conspiracy in this case.

Now, the defendants have never met that. The conspiracy is, as I said, paragraph 45 (a) to (e) and the other paragraphs of the complaint which define it.

In the light of what I have just said, I want to take up some of the provisions of the decree. I want to first take up Section III.

Section III provides:

> "The said defendants, and each of them, have contracted, combined, and conspired to restrain trade and commerce in gypsum products and have monopolized, attempted to monopolize, combined and conspired to [fol. 634] monopolize trade and commerce in gypsum board among the several States, in violation of Sections 1 and 2 of the Sherman Anti-Trust Act."

Now, before I go on with my discussion there, I think that in view of the fact that we have no assurance that findings of fact and conclusions of law are going to be made in this case, we think that there should be some amendment which the court might consider. We have had that amendment typed, and that amendment should appear immediately following the period at the end of that sentence, which period should be changed to a comma; and we would then add what I have passed up to the court, that:

"Each of the license agreements relating to board, metalized board, and perforated lath entered into between United States Gypsum Company and the other defendants herein is adjudged unlawful under the anti-trust laws of the United States and is illegal, null and void."

Chief Judge Stephens: You suggest that goes after what?

Mr. Knuff: After the last word on the page there, "the Anti-Trust Act."

Chief Judge Stephens: Of what article?

Mr. Knuff: Article III, Your Honor. That is on page 3. Now, of course, that will necessitate a revamping of Section VII.

Section VII, if Your Honors please, appears on page 9 of the Government's proposed decree. Six lines down from the [fol. 635] beginning after the word "cancellation", insert a period and delete everything that follows after that. I think in view of what has been said today and in view of the fact that there is no assurance that findings of fact are going to be made, that consideration will have to be given by the court to these changes that I have suggested.

Now, I want to take up Section III in the light of what the defendants say.

Judge Jackson: How about paragraph 2 there under your Article VII, Mr. Knuff? You say, "That from and after the effective date", and you have stricken the effective date of cancelation in the previous paragraph, under paragraph 1. Would that necessitate a change in that paragraph?

Mr. Knuff: It may be that it might. On the other hand, when you are declaring them null and void, which I suggest under III, null and void could probably be considered as a synonym for cancelation, but certainly——

Judge Jackson: That would then be the date of the decree, would it, the date of filing?

Mr. Knuff: That is right.

Judge Jackson: All right.

Mr. Knuff: I have not matured all considerations concerning the impact that these proposed suggestions will have upon other portions of the decree. This occurred to me now, and I thought I ought to call the court's attention to it.

[fol. 636] Now, the defendants say that this section of the decree——

Judge Jackson Which one is that?

Mr. Knuff: Section III. The defendants say that Section III of the decree should not contain any provisions relating to monopoly. Their reasons are that the language, which I have pointed out on page 389 and 393, relating to this preliminary question, compels this result.

Well, of course, the answer to it is as I have indicated. The language at 389 and 393 was used for the purpose of determining a preliminary question. It did not purport to rule on the scope of this case. Therefore, there should be included in this section of the decree provisions relating to Section II of the Sherman Act. That is, the monopoly section.

Now, in addition, a further answer can be made that the Supreme Court has specifically said, when they were passing on this case under Section IV, that the defendants have monopolized board. They said that, not under Section IV, they said it under Section V; and at page 400 here is what the Court said:

> "Patents grant no privilege to their owners of organizing the use of those patents to monopolize an industry through price control, through royalties for the patents drawn from patent-free industry products and through regulation of distribution. Here patents have been put to such uses as to collide with the Sherman Act's protection of the public from evil consequences. [fol. 637] The defendants did undertake to control prices and distribution in gypsum board. They did utilize an agency, Board Survey, Inc., to make this control effective. Such facts, together with the other indicia of intent to monopolize the gypsum board industry, hereinbefore detailed as to the agreements, bulletins and declarations, convince us that the defendants violated the Sherman Act."

Now, our Section III, dealing with the monopoly charge, is in line with the language that the Supreme Court used. We say there:

> "The said defendants . . . have monopolized, attempted to monopolize, combined and conspired to monopolize trade and commerce in gypsum board . . ."

That is what the Supreme Court said at page 400.

On June 29 of last year we argued this same proposition before this court, and I want to call the court's attention to page 38 of our brief on that argument.

Chief Judge Stephens: What date was that?

Mr. Knuff: Page 38.

Chief Judge Stephens: What date?

Mr. Knuff: June 29, 1948, Your Honor, page 38, where we set out the cases and where also we set out in full just what the defendants have done.

Chief Judge Stephens: Just a minute. That is June 29?

Mr. Knuff: Yes.

[fol. 638] Chief Judge Stephens: And the pages there run from 7800 to 7942.

Mr. Knuff: If Your Honor pleases, I am referring to our memorandum that we filed on that date, page 38.

Chief Judge Stephens: I thought you were talking about the argument.

Mr. Knuff: I realized there was some slight confusion.

Now, the Supreme Court has said in the American Tobacco case that the material consideration in determining whether or not a monopoly exists is not that prices are raised or that competitors are excluded from the market, but that power exists to raise prices and exclude competitors and that an intent to do so is present.

Now, look. These license agreements provided for price control. It is an admitted fact in this case that U.S.G. did fix the prices, not on fifty percent of the board, not on sixty percent of the board, but on one hundred percent of the board manufactured in the Eastern area.

So that the first portion of the American Tobacco decision we more than meet. It is not a question that prices have been raised, but that power exists. We not only show power, but we show the exercise of that power. Prices have been fixed. They were fixed in this industry from November, 1929, down to at least June or July 8, 1941.

The second phase of that test: Did they have power to [fol. 639] exclude others from the industry? Of course they did. Under Article IX of the license agreements of November, 1929, before any manufacturer could sell board at any price to a manufacturing distributor, he had to have U.S.G.'s permission. It was not a question whether or not he was

going to sell board at a discount that he had to have U.S.G.'s permission. Before he could sell board at any price, under Paragraph IX of that November, 1929, license agreement, he had to get U.S.G.'s consent.

They had power there to exclude. Did they use the power? Of course, they used the power.

They excluded from this industry all jobbers of board. Those jobbers of board have been excluded from this industry since August 8, 1930, down to the present time, and U.S.G. does not offer to prove differently in their proffer.

So that when you consider the test that we have to meet, as laid down in the American Tobacco case, we not only meet the test, we more than meet it. We show not only power, but we show the exercise of the power. I am not pressing at this time, although I am not waiving it, the exclusion of Cardiff Gypsum Company.

The defendants argue, with reference to this same Section III, that the decree should be limited to patented board. Well, there are some considerations that I think ought to be called to the court's attention in connection with that.

First, so limited, this puts the defendants in the position [fol. 640] to argue that in 1954, when the patent license agreements expire, that then this section of the decree would have no application to what they are manufacturing; and

Second, whether or not the board that is manufactured is patented is certainly a debatable question.

The relief, to be adequate, should cover every type of board.

[fol. 641] Justice Jackson in the International Salt case said:

> "When the purpose to restrain trade appears from a clear violation of the law, it is not necessary that all the untraveled roads to that end be left open and only the worn ones be closed."

Now, has there been a clear violation of the law? I submit that these defendants have violated the Sherman Act in almost every conceivable way possible, and they have done it for more than twenty years.

When the purpose to restrain trade appears from a clear

violation of the law, then putting the matter affirmatively, it is the duty of the court to block all roads. This decree should not be limited to patented board, it should comprise all types of board.

Judge Jackson: Gypsum board.

Mr. Knuff: Gypsum board, not patented board. I am passing by, I make no point as to whether or not the defendants manufactured patented board because I argued before that there was no evidence in this case showing any patented board had been made.

Now, third, there is nothing in the Supreme Court's opinion which would restrict this case to patented board. At pages 389 and 393, what the court there said again was in connection with the declaration rule; and in Point IV of the opinion the Supreme Court said that the evidence disclosed that the defendants did associate themselves in a plan to blanket the industry under licenses and stabilize [fol. 642] prices. The court did not say that the evidence disclosed a plan to stabilize prices on patented board.

Now, I want to come to Section VI of the decree. That is the section that deals with compulsory licenses.

We pointed out there are three precedents for that: Hartford-Empire, National Lead, Line Material. Counsel for U.S.G. argues that the Hartford-Empire case does not apply because in that case, so it is asserted, there was a patent pooling arrangement.

Well, the answer to that appears in the record in this case. We also have a patent pooling arrangement here. Your Honors will recall that back in 1926 when Mr. Blagden and Mr. Avery were negotiating for the license agreements, Blagden offered to transfer to U.S.G. the thirty or more patents that Beaver had in any way relating to board. The reason why he transferred them is beside the point. They were transferred.

In paragraph 84 of this complaint we say that in 1929 U.S.G. acquired the starch patents for the purpose of fixing prices. They may have also acquired the starch patents in order to relieve themselves of any claim for infringement that Universal had against U.S.G.; but, certainly, when this court reads Exhibit 231 and reads all the other exhibits relating to the various meetings that were held during the summer of 1929, I am quite convinced that an inference that

U.S.G. acquired those starch patents in order to fix the [fol. 643] prices on board is justified.

The Supreme Court, as I have said, has sustained provisions of decrees providing for compulsory licenses; and this case cannot be distinguished from them. When you have involved the principle that where in an anti-trust case the defendants have misused patents, then a District Court has power to compel compulsory, reasonable royalty licenses.

Now, that is the principle. There has been a misuse of patents in this case. The Supreme Court has said that on two occasions, at least.

They said it at page 391:

> "Conspiracies to control prices and distribution, such as we have here, we believe to be beyond any patent privilege."

At page 400 the Supreme Court said:

> "Patents grant no privilege to their owners of organizing the use of those patents to monopolize an industry through price control, through royalties for the patents drawn from patent-free industry products and through regulation of distribution."

And this is important:

> "Here patents have been put to such uses as to collide with the Sherman Act's protection of the public from evil consequences."

[fol. 644] Now, I want to make sure that the court understands our position thoroughly as to these compulsory reasonable royalty licenses.

Judge Jackson: Do you think that is punitive action?

Mr. Knuff: Oh, definitely not.

Judge Jackson: It is?

Mr. Knuff: Definitely, it is not punitive, no.

Judge Jackson: Why? You are robbing a man of property rights. He has a right to make and to vend and to prevent others from making. Now, he has a patent. The assumption is that that patent is valid. Does he not have a right to exclude anybody he wants, as a broad proposition?

Mr. Knuff: As a broad proposition, that is correct.

Judge Jackson: All right. Now, suppose that under a mistaken interpretation of law, which I think is pretty apparent in this case, that all of the parties in the gypsum industry were parties defendant here, their counsel, their officers, felt that under the General Electric decision they were entitled to do as they did. I have not seen anything that would indicate bad faith.

Mr. Knuff: But good faith, Your Honor——

Judge Jackson: Or an evil intent here. Now, if people did do as they thought they had a right to do and there was nothing sub rosa about it, why do you think they should be visited with a penalty?

[fol. 645] Mr. Knuff: Well, I will answer your question.

Judge Jackson: Although the things that they did, as a matter of law, under the decisions is held to be a conspiracy. That is something that bothers me very much.

Mr. Knuff: I am glad Your Honor brought it up because I want to point out to you that good faith is not in issue in this case.

Judge Jackson: That may not be. It is not, anyhow.

Mr. Knuff: Then, certainly, the Supreme Court said that good intentions or good motives——

Judge Jackson: Do you punish a man for pursuing good intentions? You say it is punitive.

Mr. Knuff: No, I do not say it is punitive.

Judge Jackson: Oh, well, explain why it is not.

Mr. Knuff: It is not punitive for the reason that the Supreme Court has approved of it, unless the court is going to say the Supreme Court is approving something punitive. They have approved of that.

Now, under our system of law I do not think that we can attribute to the Supreme Court the idea that the Supreme Court is going to punish somebody in an equity case.

Judge Jackson: Oh, no! That would be a very peculiar kind of assumption to make. Go ahead. I just had another thought in my head that escaped me but it may come later on.

Oh, yes, here is what I was about to ask you: Have you [fol. 646] any cases in which the decree, any anti-trust cases, in which the decree did not provide for compulsory licensing?

Mr. Knuff: Are there any cases?

Judge Jackson: Yes.

Mr. Knuff: I suppose there are. I cannot——

Judge Jackson: There must be a distinction, then, between the facts of the case where they do have the compulsory licenses and the other cases in the decrees where they have not.

Mr. Knuff: I say I presume there are. I do not know.

But I do say that where you have a misuse of patents in an anti-trust case, that the principle is that the court has the power to compel compulsory licenses.

Judge Jackson: Undoubtedly, but I am looking at the equity of the thing. Should we do it in this case?

Mr. Knuff: I think you should do it in this case, because unless you compel U.S.G. to grant licenses, you are leaving untouched the very source of power which Chief Justice White in the Standard Oil case said should be neutralized.

The power to compel compulsory licenses is essentially the same power that equity courts have to compel divestiture of assets.

Judge Jackson: Well, yes, we have the power, undoubtedly. I am just talking about the propriety of invoking that power so that we may do it, that is all, in this case and in these circumstances.

[fol. 647] Mr. Knuff: If you do not invoke it in this case, U.S.G., as one of the members of the court said yesterday, would have the veto power to determine who is coming into this industry. For twenty years these defendants, good faith or no good faith, good intentions or bad intentions, have violated the Sherman Act. Three of these defendants control 89 percent of the gypsum board. U.S.G. can exercise the power that it has, and which Chief Justice White said should be neutralized, simply by inaction, and they intend to use this power, because in that section of their decree they only specify that they will license the present defendants, and it seems to me——

Judge Jackson: That is about the whole industry, is it not?

Mr. Knuff: That is right. It is all the board industry, 100 percent of it, but it seems to me to point out very forcefully the truth of Justice Jackson's observation in the International Salt case, that an anti-trust defendant will not

give up the fruits of his violations more completely than the court requires him to do.

The stand taken by U.S.G., if any proof is ever needed as to the truth of that statement, we have it right here.

I think that in order to promote the public interest, this court should create an atmosphere under which competition would have a chance to be revived, create the atmosphere, let someone come into this industry if they want to. If they do not want to, we cannot compel them to come in, but at [fol. 648] least in the public interest this court, I think, should create that atmosphere, so that any person who wants to come in here can get into this industry and possibly bring about some measure of competition in it that has not existed for twenty years.

Judge Jackson: Well, it will exist after this decree goes down, will it not?

Mr. Knuff: Not unless we get compulsory licenses, it will not.

Judge Jackson: Well, suppose compulsory licenses went to each of the present licensees, the present defendants; that is the whole industry.

Mr. Knuff: That is the whole industry.

Judge Jackson: U.S.G. owns the patents.

Mr. Knuff: That is right.

Judge Jackson: It is directed then, it would be directed in such a decree that the licensees here would not lose, as far as losing their investment and their business is concerned. Now, is the owner of a patent under the circumstances of this case compelled to give a license to any Tom, Dick, and Harry that applies for it?

Mr. Knuff: I think under the circumstances of this case, yes, Your Honor.

Judge Jackson: I do not know.

Mr. Knuff: I think that. If you want to create the atmosphere——

[fol. 649] Judge Jackson: Atmosphere! What is this business of atmosphere? That must be something that surrounds an industry. Here you have the whole gypsum board industry here.

Mr. Knuff: Yes.

Judge Jackson: Sure.

Mr. Knuff: You have the industry, but you do not have any opportunity for any other person to get into the industry. You have got a closed circle. You have drawn an iron curtain around this industry, and the old saying that you cannot teach an old dog new tricks will apply here. These defendants know what is expected of them. They do not need to meet any more. This conspiracy has a momentum, which is self-perpetuating.

So, what we are asking this court to do is to afford an opportunity for someone else to get into this business, albeit U.S.G. and the other licensees want to maintain the artificial structure which exists in the industry today.

Judge Jackson: I get your contention now. I just wanted to get your idea on it and explain to you how I felt about it.

Mr. Knuff: I understand, Your Honor.

Judge Garrett: You said they had been violating the law for twenty years.

Mr. Knuff: That is right.

Judge Garrett: You stand on that assertion, do you?

Mr. Knuff: Yes, 100 per cent.

Judge Garrett: Although the General Electric case had [fol. 650] been followed up until this last two years by the Supreme Court itself; isn't that right?

Mr. Knuff: That is right.

Judge Garrett: So how could they have been violating the law for twenty years? I understand your theory about it. That is, that when the court declares a certain thing the law, it must be assumed to have always been the law.

I have often wondered whether that was true. We are all familiar with the old expression: When counsel was arguing a point of law, the judge said, "Oh, that's not the law," and counsel very courteously responded, "That was the law until Your Honor spoke."

Now, was not the General Electric case the law?

Mr. Knuff: That is right.

Judge Garrett: Until the Supreme Court spoke.

Mr. Knuff: The General Electric case, insofar as the facts of the General Electric case are concerned, is still good law and has not been overruled.

Chief Judge Stephens: I thought you said it had been sufficiently embalmed so that it would never be any good any more.

Mr. Knuff: I think that is true.

Judge Garrett: I really wondered why in that Line Material case—Justice Douglas, I believe it was Justic Douglas—went very frankly to the heart of the matter and said, "We [fol. 651] ought to overrule that General Electric case."

I could understand this better and could follow it with much more ease if the court had overruled it instead of trying to keep the Electric case as the law or a part of the law and at the same time nullify it if the decree that you are contending for be granted.

I hope you will understand my position about this matter. I want to follow the Supreme Court.

Mr. Knuff: I know you do, Your Honor.

Judge Garrett: In every way that it should be followed. In fact, I must follow it. That is the law. That is the Supreme Court, that not only every citizen should follow, but, first of all, every court should follow. So I want to follow it, but I do not want to go beyond what it said in the decision affecting this case, unless there were proof here upon controverted questions concerning which you are insisting upon a decree.

Mr. Knuff: Well, we take the position that there are no questions of fact in dispute in this case, that the matters that are in dispute in this case are inferences, the facts themselves being admitted.

These defendants do not take the position that Mr. Lenci's testimony is incorrect. They do not take the position that Mr. Blagden's testimony is incorrect, they do not take the position that Mr. Griswold's testimony is incorrect, they do not take the position that C. O. Brown's testimony is in-[fol. 652] correct. They do not take the position that Mr. Frederick Tompkins' testimony is incorrect. In fact, they do not offer to disprove any of that. They do not agree with the inferences that we draw and, therefore, they say that since we draw different inferences, there are facts in dispute. I do not think that inferences in dispute is synonymous with facts in dispute.

Now, I want to call Your Honors' attention to one thing that will take me about three minutes to do, maybe four, possibly five, and then I am going to sit down.

We contend that there must be findings made in this case, and the reason why findings must be made I have already discussed and I am not going to go into it again. But, in addition to what I have already said, I want to call Your Honors' attention to certain salient facts in this case.

This court made findings before. It made findings on the basis, first, that the General Electric case sanctioned everything that the defendants did here; second, this court ruled that we had not made out a prima facie case of conspiracy and, therefore, the declarations were not binding upon all of the defendants; and, third, this court ruled that the evidence fails to disclose that the defendants associated themselves in a plan to blanket the industry and stabilize prices.

Now, each one of those facts, each one of those circumstances was reversed in the Supreme Court. The former findings were made on the basis of those three circumstances. [fol. 653] The Supreme Court said that the General Electric case did not apply. The Supreme Court said that the declaration rule did apply and they were binding upon all the defendants. The Supreme Court said that there was a plan.

Now, obviously, since this court's prior findings were made on the basis of those three circumstances, which I have mentioned; and since the Supreme Court has said that they were wrong, certainly, I think that in the light of what the Supreme Court said—in fact, as I interpret it, in the directive of what the Supreme Court said, this court is required to change its findings and make findings in accordance with the fact that the General Electric case does not apply, make findings in accordance with the proposition that the declarations are binding, and make findings in accordance with the principle that there was a plan to blanket the industry under patent license agreements and stabilize prices.

I think that is all I have to say. Thank you.

Chief Judge Stephens: You leave me, Mr. Knuff, entirely mystified as to what the position of the Government really is in this case. I thought when you made a motion for summary judgment and asked the court to make it on the basis of the rule which provided that there shall be a summary judgment if there is no genuine issue of material fact.

Mr. Knuff: That is right.

Chief Judge Stephens: And that being conceded in the [fol. 654] case, that patent licenses with price fixing provisions were executed on an industry-wide basis and that the parties adhered to them, that under the decision of the Supreme Court warranted summary judgment.

That was the theory on which my colleagues announced, as I understood them, that summary judgment would be entered. But you now tell, as I understand your argument during the last half hour, that the Supreme Court did not decide in Topic III of its decision that plurality of licenses with price fixing provisions was illegal, except for the preliminary purpose of determining whether or not there was a conspiracy sufficient to allow the court to rely on those declarations.

If you take the position that the Supreme Court has not decided that a plurality of licenses with price fixing provisions, industry-wide, and adhered to, which is undisputed in the case, is illegal and ask for the summary judgment to be entered on some other theory, it must be on the theory that the Supreme Court has decided the whole case on the facts although the defendants have never been heard.

Now, the defendants deny, as I pointed out in the opinion of this court, after admitting the undisputed facts about the execution of the license agreements and the terms thereof and the price fixing provisions and the adherence thereto, the defendants deny that they have violated Sections I, II, and III, of the Sherman Act, or any of such sections, by [fol. 655] being parties to contracts in restraint of trade and commerce or by combining and conspiring to restrain trade and commerce, or by attempting to monopolize and monopolizing trade and commerce in gypsum board, plaster, and miscellaneous gypsum products, or in any manner charged in the complaint, or at all. They deny the allegations of paragraph 46 of the complaint to the effect that the license agreements were entered into by concerted action to give color of legality to the combination and that they were not bona fide license agreements, reasonably designed to give to U.S.G. the pecuniary reward for valid patent monopolies; they assert that on the contrary the license agreements were bona fide in both law and fact and were reasonably designed to secure to U.S.G. the pecuniary reward to which it was entitled for its valid patent monopolies.

The defendants have never had a hearing on those allegations in their answer. And if you are asking this court, the majority of the court, to enter a summary judgment, not upon the theory that the Supreme Court has held that the plurality of licenses with price fixing provisions industry-wide and adhered to is illegal, but upon the theory that it decided the whole case, then it seems to me you are either saying the Supreme Court has decided the case while there were issues of fact and it decided it in a manner which would deny the defendants the right to be heard, or else you are asking this court to do that. In which event, for the first [fol. 656] time, I think, anyone has asked the court to decide a case in denial of due process of law, because certainly the defendants are entitled to a hearing on the controverted issues in this case.

Mr. Knuff: May I speak on that?

Chief Judge Stephens: Yes, sir.

Mr. Knuff: The defendants have had their day in court. The defendants filed their proffer of proof. This court held that under the proffer of proof, even if everything that they testified to were true, it would not bring about any change.

Chief Judge Stephens: Mr. Knuff, I can save time, I think, although I want to hear you clear through, if I say I think the answer to that is that the reason my colleagues granted the motion for summary judgment was because they thought the Supreme Court had decided that a plurality of patent licenses with price fixing provisions, adhered to throughout the industry, had been held illegal by the Supreme Court and, therefore, these other issues were immaterial; but you say now that is not the decision of the Supreme Court.

Mr. Knuff: No, Your Honor, I did not say that.

Judge Jackson: I did not understand you to say that, did you?

Mr. Knuff: No, I do not say that, Your Honor. I say that the Supreme Court said that, but the Supreme Court said something else. When the Supreme Court said that a plurality of licenses in this case showed a conspiracy, I pointed [fol. 657] out that they were using that expression in connection with the declaration rule.

The Supreme Court did say that a plurality of licenses, on page 400, was wrong:

"The General Electric case affords no cloak for the course of conduct revealed in the voluminous record in this case. That case gives no support for a patentee, acting in concert with all members of an industry,"— under which patent licenses are entered into by the terms of which the industry is completely regimented.

The Supreme Court decided that a plurality of patent licenses was bad, but they decided something more than that. They did not decide just that. Do I make myself clear?

Chief Judge Stephens: I am sorry. Perhaps I am obtuse, Mr. Knuff, but I thought during the first fifteen or twenty minutes of your argument this afternoon you spent most earnestly asserting that Article III of the Supreme Court's opinion was only a tentative decision for the purpose of determining whether or not there had been action in concert, whether legal or illegal, to use your phrase, and that the Supreme Court had not decided that a plurality of licenses with price fixing provisions, industry-wide, and adhered to was illegal. I am sorry if I misunderstood you.

[fol. 658] Judge Jackson: I thought you said that a mere plurality of licenses was not per se or of itself illegal, but I did not understand you to say that licenses with price-fixing provisions that are adhered to and covering the whole industry does not show a violation of the Sherman Act.

Mr. Knuff: I think that——

Judge Jackson: Did you?

Mr. Knuff: I think plurality of licenses with price-fixing is illegal. I think that.

Judge Jackson: Sure, if it covers the whole industry.

Mr. Knuff: I think that, yes, indeed, and I think the Supreme Court said that.

Chief Judge Stephens: Well, with great respect to my colleagues and to all counsel, it seems to me, having heard argument for two days here now, that we are right back where we were on the motion for summary judgment. It seems to me what the Government is really asking this court to do, what my colleagues will be doing if they enter this summary judgment on the Government's theory, is to deny the defendants a right to be heard on the controverted issues in this case under the pleadings, and I think no summary

judgment is justified under those circumstances, and I respectfully and earnestly protest against it.

Judge Garrett: In view of that, I would like to say that I shall not agree to a decree with respect to the summary [fol. 659] judgment which goes beyond those specific findings of fact that the Supreme Court made and which have been pointed out here again and again.

If a decree is demanded with respect to facts not proven, certainly, I will not agree to it.

Judge Jackson: But at the same time any decree that is issued should be sufficiently strong to restrain the defendants, any and all of them, from doing the things that the Supreme Court has held to be a violation of the Anti-Trust Act.

Chief Judge Stephens: My colleagues think that the statement which I made yesterday, that we hoped to reach a decision on the terms of this decree by the first of the coming month was over-optimistic. In view of the complexity of the argument and the many suggestions made by the defendants and the Government, both my colleagues feel and ask me to announce that they probably will not be able to reach a decision on the decree until the summer is closed.

You, perhaps, ought to know that because you may wish to make your own plans accordingly.

Thank you for helping us, gentlemen, to the best of your ability. We appreciate all that has been said on both sides.

Mr. DeWitt, did you have some comment?

Mr. DeWitt: May we have an opportunity, if so advised, to submit additional memoranda with respect to the issues raised in this discussion?

[fol. 660] Chief Judge Stephens: How much time do you wish? We would like to restrict the memoranda as low as possible, because the more memoranda that are filed, the more there are to answer and the more delay, therefore, is entailed.

Mr. DeWitt: I should need certainly not more than 30 days, and if the court feels I should have less, less.

Chief Judge Stephens: Does anyone else wish to file a memorandum?

Mr. Connelly: I had not expected to make any such suggestion, because I had been under the impression that the entire matter was to be dealt with in argument here

today, but if memoranda should be filed, it presents the problem, we would like an opportunity to reply to it, if it should then seem desirable.

Chief Judge Stephens: Let us have an understanding now and have it over with. If anyone wants to present a further argument of authority or argument, let him so speak now or forever after keep silent.

Mr. Finck: If Your Honor please, I think we would like to file one.

Chief Judge Stephens: For National?

Mr. Finck: For National and Baker.

Mr. DeWitt: And Newark Plaster.

Chief Judge Stephens: And for Newark Plaster.

Judge Jackson: Well, then, the Government, of course, [fol. 661] ought to have an opportunity to come back.

Chief Judge Stephens: On what subject, Mr. DeWitt?

Mr. DeWitt: With respect to the provisions that should go into the decree in the light of my argument today. I have not had an opportunity to go through the decree and pick out provisions which it seems to me would be inconsistent with the provisions that we think should be included. We would like to have that opportunity.

Judge Jackson: You just merely want to collate for us the things you would like to have in there. You are not going to write a brief and argue them all, are you?

Mr. DeWitt: I would like to make a brief summary of the provisions we think should go in.

Chief Judge Stephens: That might be helpful to my colleagues. What do you want to present?

Mr. Finck: I would like to do the same thing.

Chief Judge Stephens: 30 days. How much time would you like to comment on that, Mr. Steffen, and Mr. Knuff?

Mr. Connelly: I suspect, if the court please, those memoranda are going to be directed to U.S.G.

Chief Judge Stephens: That is true. How much time would you like to have?

Mr. DeWitt: If the court please, I do not have in mind any elaborate memorandum of law to burden the court.

Chief Judge Stephens: I think it would be helpful to my [fols. 662-663] colleagues if they had your suggestions.

Judge Jackson: Make them short.

Mr. DeWitt: That is my purpose.

Mr. Connelly: Ten days.

Chief Judge Stephens: Ten days after the serving of the memorandum by Mr. Finck and Mr. DeWitt. And what for the Government?

Mr. Knuff: Ten days, if we care to. I do not know whether we will or not.

Judge Jackson: How much time are you giving them?

Chief Judge Stephens: 30 days.

Judge Jackson: 30 days and ten days.

Chief Judge Stephens: 40 days in all.

Mr. Miller: It is understood by the court that Mr. Dallstream is going to file with you within the next day or so the decree in the form we have discussed it in our statement.

Judge Jackson: Oh, yes, he said he had it circled there and would later give it to us.

Mr. Dallstream: It will be done tomorrow, sir.

(Whereupon, at 5:20 o'clock p.m., the oral argument in the above-entitled cause was concluded.)

[fol. 664] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MEMORANDUM OF DEFENDANT NEWARK PLASTER COMPANY
—Filed July 14, 1949

Defendant Newark Plaster Company respectfully requests that the following two provisions be incorporated in any decree that may be entered by the Court herein and that nothing be incorporated in any other provision of the decree which will be inconsistent with the said two provisions:

1. A provision to the effect that the existing license agreements between defendant United States Gypsum Company and the other defendants are illegal, null and void.

To accomplish this, we propose that section VII, subdivision 1 of the decree proposed by the Government be amended so as to read as follows:

[fol. 665] "VII

1. That each of the license agreements relating to board, metallized board and perforated lath which have been heretofore entered into between defendant United States Gypsum Company and each of the other corporate defendants or their predecessors or assignors and with defendant Samuel M. Gloyd, is adjudged unlawful under the anti-trust laws of the United States and is illegal, null and void."

2. A provision ordering and directing defendant United States Gypsum Company to grant to each of the other defendants, licensees herein, a non-exclusive license under each patent relating to gypsum products which defendant United States Gypsum Company either now owns or controls or may hereafter own or control, a separate license agreement to be offered with respect to each separate patent, or where there is a related group of patents, with respect to each such related group.

To accomplish this, we propose that section VI, subdivision 1 of the decree proposed by the Government be amended so as to read as follows:

"VI

1. That defendant United States Gypsum Company is hereby ordered and directed to grant to each of the other defendants herein that may apply therefor, but only insofar as defendant United States Gypsum Company has the right to do so, a separate, non-exclusive license to make, use and vend under each patent and patent application, or, where there is a related group of patents or patent applications, under the patents and patent applications in such related group, now or hereafter owned or controlled by defendant United States Gypsum Company relating to gypsum products, their processes or methods of manufacture, or their uses."

[fol. 666] I.

In support of the request to include in the decree a provision declaring the existing license agreements illegal, null and void, we rely upon the following:

(1)

Statements in the opinion of the United States Supreme Court in this case clearly indicating that the Supreme Court considered the entire agreements, and not merely the price fixing provisions thereof, invalid, as follows:

(a) "The licensor was to fix minimum prices binding both on itself and its licensees; the royalty was to be measured by a percentage of the value of all gypsum products, patented or unpatented; the license could not be transferred without the licensor's consent; the licensee opened its books of accounts to the licensor; the licensee was protected against competition with more favorable licenses and there was a cancellation clause for failure to live up to the arrangements." Slip Opinion, page 23.

(b) "The license agreements and the bulletins establish the conspiracy of the licensor and each licensee to violate the Sherman Act." Slip Opinion, page 27.

(c) "The provision in the license contracts that royalties should be paid on the production of unpatented board is strongly indicative of an agreement not to manufacture unpatented board, * * *." Slip Opinion, page 31.

(d) "The defendants did undertake to control prices and distribution, in gypsum board." Slip Opinion, page 34.

(2)

The decree in the Masonite case, which case this Court has been told closely parallels the present case, pro- [fol. 667] vided expressly that the *del credere* contracts therein involved, were illegal, null and void.

(3)

Practical considerations in connection with the negotiation of new license agreements support the request for a

provision in the decree declaring the existing license agreements illegal, null and void. If this Court in its decree merely states that the price fixing provisions of the old license agreements are illegal, leaving the inference that this Court finds all other provisions valid, questions as to the propriety of including such other provisions in new agreements will be the subject of dispute. Examples of such provisions are:

(a) Whether royalties may be properly required to be paid by the licensee under a license agreement, whether the licensee uses the patents or not.
(b) Whether defendant United States Gypsum Company as licensor shall have the right to inspect the books, records and accounts of each licensee.
(c) Since the price fixing provisions are inextricably intertwined with the other provisions, whether any given provision is a price fixing provision and therefore illegal.

The Court will be careful to note that the suggestion that a provision that each of the patent licenses is cancelled and terminated, is equivalent to a provision that they are illegal, [fol. 668] null and void, is entirely unsound. In the colloquy on the argument, Judge Jackson was quick to recognize this fact, and asked counsel whether counsel would approve as an addition to the statement that the patent licenses are cancelled and terminated, a further statement that such cancellation and termination was made because the patent licenses were illegal. As we recall, counsel in his reply to Judge Jackson indicated that he did not consider a provision for cancellation and termination of the agreements equivalent to a provision holding that the license agreements are illegal, null and void; nor did counsel agree to adopt Judge Jackson's suggestion that the decree state that the agreements were cancelled and terminated because they were illegal, null and void.

If there is included in the decree the provision requested to the effect that the license agreements are illegal, null and void, we submit that there is no need to include a provision for the cancellation and termination of the existing agreements, since if the agreements are pronounced illegal,

null and void, we are not concerned with a formal cancellation or termination of them.

Therefore, in addition to the above proposed amendment to section VII, subdivision 1 of the Government's proposed decree, we request that section VII, subdivision 2 of the Government's proposed decree be amended by omitting therefrom at the beginning thereof the words:

> "That from and after the effective date of the cancellation provided for in sub-section 1 of this section"

so that section VII, subdivision 2 will commence with the [fol. 669] words "Each defendant is hereby enjoined ***."

II.

If this Court concludes that there should not be included in its decree the proposed provision to the effect that existing license agreements are illegal, null and void, then we respectfully request that this Court include in its decree a provision stating clearly that the price fixing provisions of the license agreements alone are illegal, null and void and that all the other provisions of the license agreements are legal.

For the reasons given above, we do not believe that this Court should include such a provision as that just mentioned but we submit that it is better to have a clear-cut provision on the question of the illegality of the provisions of the license agreements rather than one that is ambiguous or none at all.

III.

The second provision that we respectfully request the Court to include in any decree entered herein, is a provision directing defendant United States Gypsum Company to grant to each of the other defendants herein a non-exclusive license under each patent relating to gypsum products which defendant United States Gypsum Company either now owns or controls or may hereafter own or control, a separate license agreement to be offered with respect to each patent, or where there is a related group of patents, with respect to each such related group.

In support of this second proposed provision, we rely upon the following:

[fol. 670] (1)

If defendant Newark Plaster Company cannot obtain licenses under patents owned or controlled by defendant United States Gypsum Company, it may find itself in a position where it is unable to compete at all in the manufacture of gypsum products. The result of the withdrawal of defendant Newark Plaster Company and other small companies similarly situated from the manufacture of gypsum products would concentrate still further the control of the gypsum board industry in the hands of the remaining companies, the principal one of which would be United States Gypsum Company. If the small companies therefore, are wiped out through inability to obtain licenses under patents owned or controlled by United States Gypsum Company, the entire purpose of the litigation will be defeated.

(2)

What has just been said about the necessity of a license agreement under existing patents applies with equal force to patents relating to gypsum products which defendant United States Gypsum Company may acquire and own or control in the future. If defendant United States Gypsum Company does acquire far-reaching patents radically changing the methods of manufacture of gypsum products, and those patents are not made available to such small companies as defendant Newark Plaster Company, those small companies will be unable to compete and will have to abandon the field to the larger companies, thereby bringing about a greater concentration of control of the industry in the hands of one or more of the large companies.

[fol. 671] (3)

The necessity for a separate license under each patent or related group of patents is illustrated in one of the forms of license agreements submitted to defendant Newark Plaster Company under date of June 7, 1949. This proposed license agreement purports to grant a license under any or all of certain patents specified therein by number. Three of the four patents specified relate to the bubble process. The fourth relates to something entirely different,

i.e., the perforated lath patent. The royalty payable under the proposed license agreement would be the same whether the licensee used all the patents or merely the perforated lath patent. In other words, a licensee who might want to use the perforated lath patent alone would have to pay the same royalty that he would pay if he used the perforated lath patent and the bubble patents. There would seem to be no good reason why each licensee should not be permitted to take a license to use the perforated lath patent for a specified royalty and a separate license to use the group of related patents involving the bubble process.

Respectfully submitted, Benjamin P. DeWitt, Attorney for Defendant Newark Plaster Company.

[fol. 672] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

SUPPLEMENTAL MEMORANDUM OF DEFENDANTS NATIONAL GYPSUM COMPANY AND MELVIN H. BAKER—Filed July 16, 1949

For the reasons stated in their memorandum dated March 4, 1949 and orally to this Court June 14, 1949, Defendants National Gypsum Company and Melvin H. Baker respectfully submit, for the convenience of this Court, the following outline for a fair and equitable decree in this action. The decrees proposed by the Government and United States Gypsum Company have been used as the bases for this outline and the Articles contained herein have been adopted in whole or in part from the said proposed decrees. Where modifications are suggested, the additions or substitutions have been underscored and the omissions noted.

Under the circumstances we respectfully request this Court to adopt:

[fol. 673] ARTICLE I

Government's proposed Article I.

ARTICLE II

United States Gypsum Company's proposed Article II, omitting therefrom as unnecessary, paragraph 4 thereof defining "minimum price provisions."

ARTICLE III

Government's proposed Article III, modified as follows:

> "The *defendant companies,* and each of them, have contracted, combined, and conspired to restrain trade and commerce in gypsum *board* and have monopolized, attempted to monopolize, trade and commerce in gypsum board among the several States, in violation of Section 1 of the Sherman Anti-Trust Act."

The words "and 2" in the Government's proposal have been omitted herefrom.

ARTICLE IV

Government's proposed Article IV, modified as follows:

> "That the provisions of this decree applicable to any *defendant company* shall apply to such defendant and to each of its officers, servants and employees, and to each of its successors and assigns and to all persons [fol. 674] acting or claiming to act, through or for such defendant."

The word "attorneys" in the Government's proposal has been omitted herefrom.

ARTICLE V

Government's proposed Article V, modified as follows:

> "That the *defendant companies,* in connection with the offering for sale, sale, and distribution of gypsum *board* in interstate commerce, be and each of them hereby is jointly and severally enjoined and restrained from *restraining trade in gypsum board among the several States in the eastern territory of the United States by* entering into, continuing, cooperating in, or carrying

out any planned common course of action, undertaking, agreement, combination or conspiracy between two or more of such defendants or between any one or more of such defendants and *other manufacturers of gypsum board,* to fix, establish, maintain, control, or make uniform the prices, terms and conditions of sale at which gypsum board shall be sold."

The following parts of the Government's proposal have been omitted herefrom: The phrase in the preamble "to do or perform any of the following things"; the words in paragraph 1 "or resold"; and paragraphs 2-10.

ARTICLE VI

Government's proposed Article VI, except the words "and XI" should be deleted where appearing in paragraph 2, and the term "gypsum products," appearing in para-
[fol. 675] graph 1, should read "gypsum board."

ARTICLE VII

Government's proposed Article VII, modified as follows:

"That each and all of the patent license agreements, and other arrangements relating to board and perforated lath, set forth in the attached schedule, are hereby *declared to be null and void and are hereby* cancelled. Each *defendant company* is hereby enjoined and restrained from further performance of any such agreement, contract, assignment or other arrangements and from adopting, adhering to or entering into any future substantially similar arrangement, contract, assignment or other arrangements."

The clause following the semi-colon in paragraph 1 and the clause preceding the first comma in paragraph 2 of the Government's proposal have been omitted herefrom.

ARTICLE VIII

United States Gypsum Company's proposed Article VIII.

ARTICLE IX

United States Gypsum Company's proposed Article IX, as modified below:

"Judgment is hereby entered against the defendant companies for ....% of the costs, to be taxed in this [fol. 676] proceeding as *follows:*

The Celotex Corporation	....%
Certain-teed Products Corporation	....%
Ebsary Gypsum Company, Inc.	....%
National Gypsum Company	....%
Newark Plaster Company	....%
Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company	....%
United States Gypsum Company	....%

ARTICLE X

United States Gypsum Company's proposed Article VII. Respectfully submitted, Elmer E. Finck, Finck & Huber, Attorneys for National Gypsum Company and Melvin H. Baker

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[fol. 677] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

REPLY MEMORANDUM OF UNITED STATES GYPSUM COMPANY—
Filed July 25, 1949

I.

Licensee's Proposal

The defendant licensees propose that the patent licenses in the case be declared illegal in their entirety and that the United States Gypsum Company (hereinafter referred to as "Gypsum") be compelled to grant licenses to all appli-

cants under all of its patents now owned or hereafter acquired. The form of decree in this respect filed on behalf of Celotex since the arguments, with modifications has been proposed by Newark and National in their memoranda.

(a) In this connection it is important to bear in mind that (1) the motion of plaintiff for summary judgment was sustained upon the theory that the Supreme Court had held that the plurality of patent licenses, industry-wide with price-fixing provisions adhered to by the defendants with knowledge of the adherence of others was *ipso facto* illegal [fol. 678] as in violation of the Sherman Act, notwithstanding the assumed legality of each separate patent license, and (2) the defendants, in entering into the license agreements, acted in the utmost good faith in reliance upon the doctrine of the *General Electric* case as it was then construed by the Supreme Court and the Bar.

The Government's position, upon the present state of the record, that it is entitled to judgment on the theory that all of the controversial issues of fact have been conclusively determined against the defendants, is untenable. Notwithstanding the issues raised by the pleadings, counsel asserted that the Supreme Court, having held there was a *prima facie* case of conspiracy, the defendants are conclusively bound thereby and must therefore be held to have associated themselves in a plan to blanket the industry and stabilize prices, as set forth in paragraph 45 (a) to (e) of the complaint (Tr. 8266, 8268-71). They said that the *prima facie* case, including the declarations, had now become conclusive (Tr. 7978, 8018), and that the plurality of licenses industry-wide was not the conspiracy in the case (Tr. 8272). Counsel ignored the suggestion of the court that the defendants had never had a hearing on the allegations in their answers (Tr. 8291-4).

Notwithstanding their original argument upon the motion for summary judgment that all these controversial issues were to be laid aside as immaterial (Tr. 7985-6, 7988-94, 7998-8002), counsel for plaintiff now, for the purpose of obtaining the findings of fact and a decree beyond the scope of the determination, insist that the Supreme Court found conclusively that the defendants had associated themselves in a plan to blanket the industry and stabilize prices as [fol. 679] charged and that the so-called *prima facie* case

became binding in all respects against the defendants without any opportunity to be heard. Although urging upon the motion that the summary judgment should be granted upon the plurality of license theory, they now, when they come to a decree, seek findings of fact and provisions in the decree wholly outside of that theory.

(b) It is clear upon the present state of the record that the only facts which have been conclusively determined in the case are those within the scope of the determination upon the motion for summary judgment and which plaintiff urged were admitted by defendants upon the presentation of its motion. These are that the defendants constituted all former competitors in the gypsum board industry, that the defendants executed patent license agreements, industry-wide, with price-fixing provisions, and that the defendants in an entire industry adhered to the price-fixing provisions of the license agreements with knowledge of the adherence of others.

Upon those facts and the fact that the defendants were acting in the utmost good faith in relying upon the doctrine of the *General Electric* case, there is no ground upon which the court could decree that Gypsum be required to grant compulsory licenses to all applicants or to defendant licensees under its patents now owned or hereafter acquired at reasonable royalties to be fixed by the court. The defendant licensees are in no other position with respect to this question than is the Government in representing the public interest.

The other evidence in the case upon which the Supreme Court commented in holding there was a *prima facie* case, including the declarations, is in controversy between the [fol. 680] parties and no finding with respect thereto could be made by the court without opening the case and giving each of the defendants its day in court. If the Government or defendant licensees claim there are any other admissible facts upon which they would be entitled to a decree for compulsory licensing, the court may not consider it without giving Gypsum an opportunity to be heard. To deny Gypsum the right to be heard and enter any such decree, is but to deprive Gypsum of its property without due process of law, in violation of its constitutional rights.

(c) Never has a court imposed compulsory licensing upon a patent owner in a case like this. Out of the scores of anti-trust cases involving the use of patents in violation of the Sherman Act, compulsory licensing has been imposed over the patentee's objection in only two or three cases. The Court has sustained such a decree where it was required to preclude the resumption of deliberate unlawful practices because of a persistent manifestation by the defendants of a purpose to violate the Anti-trust Act. In other words, after a careful analysis and understanding of all the facts and circumstances of the case, the Court has found that the requirement for compulsory licensing is necessary to prevent further violations of the Act in aid of the injunctive provisions of the decree. It has never permitted any blanket decree for compulsory licensing but, on the contrary, has limited the requirement to meet the exigencies of the particular case and limited the patents to which it was applicable.

The Court has held that to require a decree for compulsory licensing at reasonable royalties for any reason other than that stated above is but to impose penalties in the guise of preventing future violations.

[fol. 681] II.

Decree Proposed by Celotex

The proposed decree suggested by Andrew J. Dallstream at the hearing on Tuesday, June 14, 1949, on behalf of Celotex and other defendant licensees contains the same provisions as the decree suggested by counsel for the United States Gypsum Company except with respect to Articles IV and VI.

(a) Peculiarly, the defendant licensees, by the suggested amendment to Article IV, would ask the court to adjudge "each patent license" unlawful and illegal, when, as a matter of fact the motion for summary judgment was decided upon the concert of action theory above mentioned. It is concert of action with respect to the price provisions of the group of licenses which, according to this court's view of the Supreme Court's opinion, constituted a violation of the Sherman Act. Why, then would these defendants suggest such a change in the decree wholly beyond the

holding of the Supreme Court, the scope of the determination upon the motion for summary judgment, and in a case where no such provisions are warranted? Not even the Government suggested that the entire contract be declared illegal until defendant licensees suggested it.

It is true that in the *Masonite* case the contracts were adjudged illegal, but in that case there was no motion for summary judgment the granting of which limited the scope of the determination as in this case. Judgment there was rendered after the defendants had had their day in court. Here it is the adherence to the price provisions of the plurality of licenses industry-wide with knowledge of the adherence of others which, according to the majority view [fol. 682] of this court, the Supreme Court held was a violation of the Sherman Act.

The provisions suggested by us to the effect that (1) the minimum price provisions of the patent licenses are declared to be illegal, and (2) each of the patent licenses is cancelled and terminated, give effect to the legal conclusion reached by the Supreme Court as construed by this court, and adequately meet the requirements of the decision made upon the motion for summary judgment.

The defendant licensees can have no purpose in making the suggestion that each patent license be adjudged illegal except to obtain some advantage with respect to the use of the patents. They apparently believe it will relieve them from accounting for anything done either before or after the Supreme Court's decision.

(b) The defendant licensees would ask this court to adopt in lieu of Article VI of Gypsum's suggested decree the punitive provisions of Article VI of the Government's decree. Notwithstanding the fact that they make no material objection to the forms of licenses submitted on behalf of Gypsum, they ask the court, in a case like this, to grant compulsory licensing by granting to any applicant a license under all patents and patent applications now or hereafter owned or controlled by Gypsum relating to gypsum board, their processes or methods of manufacture or their uses. They even suggested that there was a patent umbrella under which, for the payment of license fees by them and funds contributed by Gypsum, there was a laboratory and research program available to the industry. Such an idea was never

thought of, much less at any time discussed. It is without any support in the record and we are compelled to say [fol. 683] that it is untrue.

Defendant licensees' suggestion in this respect is inconsistent with their position elsewhere with respect to the decree. In one breath they accept the view that there is nothing in the case which could possibly bring condemnation upon the defendants and in another, to satisfy their desire for the use of Gypsum's future patents without any right whatsoever, they would demand a punitive compulsory licensing provision against Gypsum. If the Government is not entitled to such a provision, no defendant is.

The licenses offered by Gypsum under our suggested Article VI give these defendants, in so far as they need any protection upon the cancellation of their contracts, everything they now have under their present license agreements, including most reasonable royalties with respect to which no complaint has been made. The licenses are the same as those they now have except there are no pricing provisions, royalties are to be computed only upon the basis of board produced by use of the patents, all provisions criticized by the Government have been omitted except that there is a provision for inspection of books and records to verify royalty payments, which, however, at the licensee's election is to be made by an independent public accountant. They are drawn in such form that each of the licensees may take a license under any one or all of the patents described in the particular license.

Not only would they join in the Government's demand for compulsory licensing in a case like this, but defendant licensees would extend the demand to every applicant for the use of all of Gypsum's board patents, present, past and [fol. 684] future, and for all time. They would strip Gypsum of its property rights by restricting Gypsum from disposing of its patents without exacting a similar requirement from its purchaser after notice to the Attorney General and by paragraph 3 of Article VI would impose restrictions against the use by Gypsum of its own property.

The purpose behind this most unusual demand by defendants against whom the Government is also seeking a decree, is to anticipate the termination of the licenses under present existing patents through the expiration of

all of the patents by May 1954. The only basis upon which a court could include in the decree a provision for compulsory licensing at reasonable royalties is that it is necessary to do so to prevent further continuance of the violation enjoined in the decree. It must be a necessary aid to the injunctive provisions of the decree. Defendant licensees make no such claim nor could they upon the record of this case.

They have no right of any kind to Gypsum's patents in the future any more than if their licenses had expired without this litigation. With the cancellation of their present licenses they should only be placed in *statu- quo* to the extent that any licensee desires to continue the use of any of Gypsum's patents under which it is presently licensed.

It is clear in this case that defendant licensees are not entitled to the use of Gypsum's patents any more than Gypsum is entitled to the use of theirs. In fact, where compulsory licensing is necessary it has been held proper to provide that the licensor, as a condition to granting the license, could require the applicant to grant it a license under any pertinent patent owned by applicant. In other words, if it [fol. 685] is necessary, it is necessary to go further than counsel would request, which merely demonstrates *that it is not at all necessary in this case.*

III

Decree Proposed by Newark

In a separate memorandum Newark Plaster Company requests a decree adjudging the license agreements illegal and granting the defendant licensees a license under all patents now or hereafter owned by Gypsum. This company, although asking upon oral argument that the defendant licensees should have the benefit of improvements on patents covered by the present licenses, now requests that Gypsum be compelled to give a license under each patent relating to *all gypsum products* which Gypsum now owns or controls or may hereafter own or control. Such a decree is not warranted under the circumstances of this case.

(a) In the first place, Newark seeks a provision that each of the license agreements be adjudged unlawful under the anti-trust laws and illegal, null and void, which not

only goes beyond the scope of the determination by this court upon the motion for summary judgment but has for its purpose an attempt to be relieved from accounting, as stated before in this memorandum.

To accomplish this purpose Newark adopts Section VII, subsection 1, of the Government's decree by striking out the provision for cancellation of the license agreements and inserting in lieu thereof a provision adjudging all of the license agreements unlawful under the anti-trust laws and illegal, null and void. The provision suggested by Gypsum in Article IV of its suggested form provides that the minimum price provisions of the patent licenses be declared [fol. 686] illegal and that each of the patent licenses be cancelled and terminated, which not only keeps the judgment within the scope of the determination but for all time puts an end to the license agreements complained of by the Government.

(b) In the second place, Newark, in its memorandum, demands the provision as stated directing Gypsum to grant to each of the other defendant licensees under each patent relating to all gypsum products of every kind which Gypsum either now owns or controls or may hereafter own or control. To accomplish this it adopts Section VI of the Government's decree by making changes in subdivision 1 of Section VI to provide that Gypsum grant such a license to each of the other defendants that may apply therefor.

Counsel, having abandoned his idea for a license under the unexpired board patents and improvements on inventions covered by such patents, not only seeks all of Gypsum's patents now or hereafter owned relating to gypsum products of every kind, including plaster, but would enjoin Gypsum from disposing of its own property and from including any condition in any license except those specifically provided in subdivision 3 of Article VI of the Government's decree, which is *limited to a nontransferable license, a reasonable non-discriminatory royalty, and cancellation upon failure of licensee to pay royalties.* In addition, such license must provide that licensee may cancel the same at any time upon thirty days' notice, that licensee shall have the benefit of any more favorable terms which may at any time be granted to any other licensee, and that Gypsum shall have no right to inspect the books to deter-

mine whether the licensee is accounting for the royalties which it owes. Furthermore, in counsel's suggestion Gyp- [fol. 687] sum is subjected to the other punitive provisions of subsections 4 to 6 of Article VI of the Government's decree.

(c) Counsel quotes from the opinion of the Supreme Court to support his statement that the Supreme Court considered the entire agreements and not merely the price-fixing provisions invalid. Like the Government, for this purpose counsel would argue that Gypsum was conclusively bound by all that was said by the Supreme Court in determining that there was a *prima facie* case, without giving Gypsum its day in court. The simple fact is that there is no basis upon the present state of the record for any determination of a violation of the Sherman Act except upon the theory that the Supreme Court held that the plurality of patent licenses, industry-wide with price-fixing provisions adhered to by the defendants with knowledge of the adherence of others was *ipso facto* illegal as in violation of the Sherman Act.

Counsel points to the *Masonite* case, saying that it provided expressly that the *del credere* contracts there were illegal, null and void. Of course it did, for the reasons heretofore stated in Point II (a) of this memorandum.

Counsel argued that if this court did not declare the license agreements illegal, null and void it would leave the inference that the court finds all other provisions valid. No such inference could be drawn from a decree which declared the price-fixing provisions illegal where the other provisions were not involved in the determination upon the motion for summary judgment.

Counsel misinterprets Mr. Connelly's argument with respect to the provision that the price-fixing provisions be held to be illegal and that the license agreements be can- [fol. 688] celled. What Mr. Connelly said was that the scope of the determination upon the motion for summary judgment was limited to the price-fixing provisions of the license agreements and that none of the other provisions of the agreement have been passed upon by the Court. Counsel also misinterprets Judge Jackson in the colloquy referred to (Tr. 8253). Judge Jackson simply asked whether you could read into the provision for cancellation that

it was made for the reason that the minimum price provisions were illegal, and Mr. Connelly (contrary to counsel's statement) said, "That could be read in, sure. * * * It could be so interpreted." Counsel overlooks Chief Judge Stephens' comment (Tr. 8244) when the latter said that he understood the motion for summary judgment was decided on the ground that the Supreme Court had decided that the plurality of licenses with price-fixing provisions, industry-wide, adhered to by the parties, was illegal.

Counsel seeks to crowd the court into his view by insisting that if the court concludes that only the price-fixing provisions are illegal, then it must declare that all the other provisions of the license agreements are legal. The other provisions have not been passed upon by the Supreme Court. Anything the court may have said with respect to a *prima facie* case could only be conclusively determined after the defendants had had their day in court.

(d) In support of his contention that Newark is entitled to a license under all of Gypsum's patents relating to all products of every kind, counsel said Newark may find itself in a position where it is unable to compete at all in the manufacture of gypsum products, a statement which has no support in the record and the accuracy of which we deny. [fol. 689] This is simply a bid to acquire the larger company's patents, something to which it is not entitled. It is not equity they are seeking. Equity follows the law.

Notwithstanding the fact that the question of control in the gypsum board industry is not in issue before the court on this motion, counsel argued that the result of the withdrawal of Newark and other small companies from the manufacture of gypsum products would concentrate still further the control of the gypsum board industry in the hands of the remaining companies, the principal one of which is Gypsum. He urges that if the small companies were wiped out through inability to obtain licenses under patents owned by Gypsum, the entire purpose of the litigation will be defeated. We thought Newark was a defendant to litigation which had for its purpose the determination of the question of the right of the defendants, including Newark, to enter into the license contracts within the doctrine of the *General Electric* case. The patent laws have not yet been socialized, nor have we reached the point in

our judicial procedure where courts will decide questions not in issue before them.

Not content with making a bid for Gypsum's patents, past, present and future, in the board industry, counsel asserted that the necessity for a license agreement applies with equal force to patents relating to other gypsum products which defendant Gypsum may acquire and own or control in the future. In other words, even where there is no issue in the case with respect to any licenses under patents relating to gypsum plaster and other miscellaneous gypsum products, counsel demands that the court award to Newark and other licensee defendants the use of all Gypsum's patents on such products now or hereafter owned. [fol. 690] They might just as well have asked for Gypsum's bank accounts. Wholly outside any issue in the case, counsel goes on to say that if Gypsum acquires far-reaching patents radically changing the methods of manufacture of such products and those patents are not made available, some of the defendant licensees will be unable to compete and will have to abandon the field to the larger companies. Need we reply to such a statement in a case like this except to say that it is a figment of imagination? What possible issue at this stage of the case is involved which would warrant this court in taking from Gypsum its property upon the theory that it might acquire some far-reaching patents radically changing the methods of manufacture of gypsum products? If we could look into Newark's files and gaze into the crystal ball, we might say the same thing about Newark.

It is not uncommon, that competitors will seek advantage over one another, but courts must be on their guard when they listen to such a plea. There is no equity in giving one competitor the patent rights of another. No judgment for use of another's patents has ever been entered except in the most extreme cases where patents had been deliberately used to violate the law and defraud others, and then only in the public interest which we have shown is not warranted in this case. If, as stated before, the Government is not entitled to such a decree, no defendant is.

Counsel finally urges that a separate license under each patent or related group of patents is necessary. We recognized this when we offered our licenses to the defendants.

We submitted a license under the board patents which included the three remaining bubble or foam patents and the perforated patent which was included in the former board [fol. 691] licenses. We also submitted a license under the related metallized group of patents and a license under the single remaining bundling patent. Nobody has raised any question with respect to any of these licenses except as to some minor details and the question raised by Newark that it should have a separate license under the perforated patents because it does not need the principal board patents. If it had been good enough to call our attention to this situation we would have been happy to offer it a separate license under the perforated patents.

IV.

Decree Proposed by National

In a supplemental memorandum National Gypsum Company made the same demand as Newark except they requested a license under all patents relating to *gypsum board* which Gypsum now owns or controls or may hereafter own or control, to *any applicant* and adopted the same general pattern as Newark except it was presented in the form of suggested amendments to the decree which it asked the court to adopt. National like Newark, is one of those companies which seeks to have the entire license contract declared illegal, apparently believing it will relieve them from accounting with respect to anything done before or after the decision of the Supreme Court.

(a) Article III of National's proposed decree provides in substance that each of the defendant companies had conspired to restrain trade and commerce in gypsum board and had monopolized such commerce in violation of Section 1 of the Sherman Act. Although in its modification of the Government's provision National eliminated any reference to Section 2 of the Sherman Act, it [fol. 692] apparently overlooked the fact that it left in the article the provision that the defendants had monopolized and attempted to monopolize trade and commerce.

National requests a provision covering a blanket charge of a conspiracy to restrain trade and commerce in gypsum board among the several states in violation of the Sher-

man Act. They have heretofore joined in the position that the scope of the determination upon the motion for summary judgment is founded alone upon the concert of action theory. No decree should be entered upon the motion in this case which goes beyond the determination that the defendants, by adhering to the minimum price provisions of the patent licenses, acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board in violation of Section 1 of the Sherman Act.

Counsel's suggestion in this respect was obviously influenced by his desire for a decree declaring that each of the license agreements was illegal under the Sherman Act.

(b) Article V of National's proposed decree adopting the Government's proposed Article V, as modified by it, in substance enjoins the defendant companies from restraining trade by entering into any plan, common course of action, combination or conspiracy between two or more of the defendants or between one or more of the defendants and other manufacturers of gypsum board to fix or make uniform prices, terms and conditions of sale at which gypsum board shall be sold.

We object strenuously to the adoption of this provision with such loose terms as "any plan, common course of [fol. 693] action," whatever that may be. It is a phrase borrowed by the Government from a Federal Trade Commission order to cease and desist in a case which involved unfair trade practices and other issues not involved in this case.

We think it is unfair in a case like this to suggest a decree to enjoin the defendants from conspiring between any one or more of such defendants and other manufacturers of gypsum board. The record is clear that the only action of which the Government may complain on its motion for summary judgment is concert of action in adhering to the price-fixing provisions of the license agreements where the defendants were acting in the utmost good faith in reliance upon the doctrine of the *General Electric* case. To extend the injunction to a general charge of conspiring to fix prices with others is unwarranted under the circumstances of this case.

(c) Article VI of National's proposed decree is an adoption of the Government's proposed Article VI except that they have deleted the words "and XI" in paragraph 2, and the term "gypsum products" in paragraph 1 they have changed to read "gypsum board."

This, with the changes mentioned, is an adoption by National of all the punitive provisions of Article VI of the Government's decree. We have already shown the objections to this article in our memorandum under the headings "Decree Proposed by Celotex" and "Decree Proposed by Newark" and will not repeat them here. It is enough to say here that there is no basis in this case for a punitive decree in favor of the Government, nor in "favor" of National to satisfy its desire to use this lawsuit to obtain Gypsum's future patents.

[fol. 694] (d) Article VII of National's proposed decree adopts Article VII of the Government's decree as modified by omitting the clause following the semi-colon in paragraph 1 and the clause preceding the first comma in paragraph 2 of the Government's proposed decree, and inserting a provision declaring the license to be null and void.

The vice of the modification lies in the provision that the patent license agreements and other arrangements relating to board and perforated lath set forth in the attached schedule are declared to be null and void. Here again is an attempt to have the entire patent license agreement declared illegal notwithstanding the fact that the scope of the determination on the motion for summary judgment lies within the concert of action theory. We have pointed out before in this memorandum the objections to such a provision and will not repeat them here.

V.

Revised License Agreements

We have revised the license agreements submitted to the court by putting the three remaining board patents in one license and perforated in another at the same royalties originally paid for the use of these patents, respectively, and in the new license agreements we have included the few additional minor details called to our attention after the last draft was submitted to the licensees.

It is important to keep in mind that in a few years all these patents will have expired. There are only three general board patents left, the last of which expires May 4, 1954. The last of the metallized board patents expires on [fol. 695] October 1, 1952. The only remaining bundling patent expires on February 6, 1951, and the perforated lath patent expires on December 5, 1950.

The demand of the licensees is for new patents when and if acquired which have nothing to do with the present license agreements.

We submit herewith revised copies of the four license agreements which contain all suggestions which have been made and contain no provisions objected to by the Government except only the right to inspect the books to determine whether the royalties are properly accounted for and in which case the licensee is entitled to have the inspection made by an independent certified public accountant who has no connection whatsoever with Gypsum. These licenses give the defendant licensees full protection for everything to which they are entitled.

Respectfully submitted, Albert R. Connelly, Cranston Spray, Hugh Lynch, Attorneys for United States Gypsum Company

July 23, 1949

Certificate of Service (omitted in printing).

[fol. 696] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FINAL DRAFT OF LICENSE AGREEMENTS

SUBMITTED ON BEHALF OF UNITED STATES GYPSUM COMPANY —Filed July 25, 1949

[fol. 697] *License Agreement*

This Agreement, made this —— day of ——, A. D. 1949, by and between United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred

to as Licensor, and ——, a —— corporation, of ——, hereinafter referred to as Licensee,

Witneseth:

that

Whereas, one or more gypsum boards (as hereinafter defined) manufactured by Licensee, are made according to the processes or embodying the claims of one or more of the patents hereinafter mentioned, and Licensee desires to obtain a license to make, use, and sell the same through the full term thereof, and Licensor has agreed to grant such license upon the terms and conditions hereinafter stated;

Now, Therefore, in consideration of the sum of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged, and of the mutual covenants and agreements hereinafter contained, the parties hereto have agreed as follows, to-wit:

1. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license, and privilege to use the process or processes, and inventions and improvements claimed in any and all of the following letters patent:

[fol. 698]

Patent Number	*Date*	*Expiration Date*
2017022	October 8, 1935	October 8, 1952
2079338	May 4, 1937	May 4, 1954
2080009	May 11, 1937	May 11, 1954

in the manufacture of gypsum board as hereinafter defined, at the plants or factories now owned or operated by Licensee, or at any other plant or factory hereafter owned or operated by it or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places, selling and using in the United States of America, and the territories and possessions thereof, gypsum board maunfactured under the processes or embodying the inventions and improvements claimed in said patents, for the full term of the last to expire of said letters patent, including any reissues thereof.

Licensor also agrees promptly to disclose to Licensee all information and formulae, not heretofore disclosed to Li-

censee, which it now has or may obtain relating to the process of making a cellular product through the formation of tenacious foam and mixing the foam with a cementitious material as set forth and claimed in applications for United States Letters Patent as originally filed by Carlisle K. Roos, Serial Nos. 733197, 3477, and 142155, and by Erik C. Bayer, Serial No. 661723, or in Letters Patent Nos. 2017022, 2079338, and 2080009, in so far as the same is or may be applied to gypsum, and including all information and formulae for the manufacture of gypsum board embodying the inventions and improvements set forth and claimed in the aforesaid applications or letters patent.

2. Licensee agrees to pay to Licensor for the right and pravilege granted under Paragraph 1 above a license fee or royalty at the rate of one percent (1%) of Licensee's selling price of all gypsum board manufactured under any of the [fol. 699] processes or embodying any of the inventions covered by said patents and sold by it during the term hereof, provided that no license fee or royalty shall be payable on gypsum board exported by Licensee to any foreign country.

Licensee's selling price shall mean the net price at Licensee's shipping point after deducting transportation charges and cash discounts allowed by Licensee; provided however, that in the case of laminated gypsum board, except with a metallized surface, the net price for the purposes hereof shall be deemed to be Licensee's net price at the time of sale in the same market area, determined as above provided, for the quantity of plain gypsum board actually used or incorporated therein.

3. The license herein granted shall be personal to the Licensee and shall not be sold, assigned or transferred, either voluntarily, or by operation of law, without the written consent of Licensor; *Provided, however,* that the license may be assigned by Licensee to any company acquiring all of Licensee's gypsum and gypsum board business, and assets pertaining thereto, or all of the capital stock of Licensee, on condition that Licensee shall first obtain, and deliver to Licensor, such assignee's written agreement to assume all of the obligations of Licensee hereunder and

agreeing to be bound by all of the terms and conditions hereof.

4. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all gypsum board manufactured under any of the processes or embodying any of the inventions covered by said patents and sold by it, together with the Licensee's selling [fol. 700] price thereof, and agrees that on or before the 20th day of each calendar month it will deliver to Licensor at its office in Chicago, Illinois, true written returns, verified under oath by an officer or other authorized agent of Licensee setting forth the quantity of all such gypsum board manufactured by it, and sold during the preceding calendar month, together with the selling price thereof as above defined. Licensee also agrees to pay to Licensor at its said office on or before the 20th day of each calendar month the hereinbefore stipulated royalties or license fees which may then be due under the terms of this agreement on account of all such gypsum board manufactured by it, and sold during the preceding calendar month.

5. Licensor, or its duly authorized representative, shall have the right at all reasonable times to inspect the books of account and records of Licensee referred to in Paragraph 4 hereof, and to make copies thereof and memoranda therefrom, *provided, however,* that upon written request of Licensee, such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne equally by the parties. If the parties fail to agree upon the certified public accountant to make such examination, then Licensor shall name three certified public accountants of good standing, not directly or indirectly employed by it or in any other manner connected with it, and if Licensee shall not accept any one of them, then Licensor shall have the right to make such examination itself.

6. Licensee agrees that all gypsum board manufactured and sold by it under or embodying the claims of any of such patents shall be distinctly marked with the word [fol. 701] "Patent" followed by the numbers of any of the aforesaid patents, the claims of which are embodied in said gypsum board, and Licensee further agrees to dis-

tinctly mark said gypsum board with the words "Licensed under the above patents and also under the process claims of patent," followed by the number of any of the aforesaid patents of which any process claimed therein is utilized in the manufacture of said product; and Licensee further agrees to distinctly mark said gypsum board with any other appropriate notice as Licensor shall specify from time to time.

7. In the event either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements to be kept or performed by it under the provisions hereof, then the other party may at its election serve upon the party in default written notice of intention to terminate this license and specifying the alleged default. If the party in default shall not cure the default so specified within thirty (30) days thereafter, then the other party may, subject to the provisions of paragraph 8 below, cancel and terminate this agreement without any court action by serving upon the party in default written notice of its election so to do; provided, that neither party shall be relieved thereby from any liability accrued at the time of such termination.

8. If a party upon whom a default notice is served under Paragraph 7 above shall deny the specified defaults, in whole or in part, then the right of the other party to terminate this license by reason of the defaults alleged shall be suspended, provided the party served shall (a) within the said thirty (30) day period provided in Paragraph 7 above cure any defaults which are not denied and (b) submit [fol. 702] to arbitration the question as to whether the specifically denied defaults in fact occurred. In the event the arbitrators find that one or more of the alleged defaults have occurred, then the party in default shall cure the same within thirty (30) days from the date of the finding of such arbitrators. If not cured within said period the party serving such default notice, in addition to and without limitation upon any other rights and remedies which it may have hereunder, may cancel and terminate this agreement without any court action by serving upon the party in default written notice of its election so to do; provided, that

neither party shall be relieved thereby of any liability accrued at the time of such termination.

All arbitrations had under this Paragraph 8 shall be in accordance with the Rules then obtaining of the American Arbitration Association, excepting only that the time allowed for objecting to arbitrators, or indicating the order of preference for arbitrators, as submitted to the parties for such purpose by said Association or under its Rules, shall in no event be less than fifteen (15) days. The finding or findings of the arbitrators shall be final and conclusive. In the event the arbitrators shall find any license fees or royalties, or other sums of money herein required to be paid by the Licensee to the Licensor, are due and owing, the arbitrators shall in their findings fix and determine the amount thereof, and Licensor shall have the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the Arbitrartors in any court of competent jurisdiction.

[fol. 703] 9. In the event the Licensee shall at any time be adjudicated a bankrupt, then the license hereunder shall immediately be and become cancelled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination.

10. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any other or further breach or breaches. Either party may specifically enforce this contract, or any of the terms, conditions and covenants thereof, by injunction or in such other manner as may be permitted by law.

11. Any notice required or permitted to be served by either party upon the other under the terms hereof, may be served by mailing the same to the other party, postage prepaid and registered, addressed to such other party at its last known principal office, and the deposit of such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder.

12. In case Licensor shall grant to any other person any license under the aforesaid patents for the manufacture,

sale or use of gypsum board made by use of the processes or embodying the claims or inventions claimed in any of said patents, or shall grant any right under any such license, upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms or extend to it the same right granted to any such other person.

13. The term "gypsum board" shall be understood to mean all board made of gypsum, by whatever name called, [fol. 704] having the characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths, laminated gypsum board, and all other gypsum boards. The term "laminated gypsum board," means a unit or assembly of units consisting of a gypsum board having attached to one or both faces thereof a layer or layers of gypsum board, insulation board, decorated paper simulating wood veneers or tile, or other material, but as used in the proviso to Paragraph 2 above shall not include gypsum board having a metallized surface.

14. If Licensor shall at any time during the existence of this agreement make or obtain any improvement for the formation of the bubbles or foam described in the process set forth in applications for United States Letters Patent as originally filed by Carlisle K. Roos, Serial No. 733197, 3477, and 142155, and by Erik C. Bayer, Serial No. 661723, or in Letters Patent Nos. 2017022, 2079338, and 2080009, or the method of its introduction into the core of gypsum board, and which improvement is covered by the claims of the aforesaid applications and letters patent, and shall itself use the same in its own manufacture, then so long as Licensee shall continue to pay the license fees or royalties hereinbefore stipulated, the right, license or privilege herein contained shall be extended to and include the use of said improvement in the manufacture by Licensee of gypsum board, subject to all of the terms and conditions herein contained, except only that Licensee shall not be required to pay any additional royalty or license fee therefor. It is further agreed that if a patent or patents shall be granted or issued for or upon said im-

provement, then all of the provisions of this agreement shall apply to the improvement set forth and claimed in any such patent or patents. Licensor will promptly notify [fol. 705] Licensee of the general adoption by it of any such improvement in its own manufacture, together with such information as it may possess as to the use thereof in the manufacture of gypsum board.

15. The Licensor agrees at any time during the term hereof to extend to Licensee, upon its written request, an indivisible and non-exclusive license or privilege to use the process or processes set forth and claimed in said Letters Patent Nos. 2017022, 2079338, and 2080009, in the manufacture in Licensee's plants of any other gypsum product not specifically covered by this agreement, and in which product Licensor shall use the same in its own manufacture, and to sell the same, upon the payment to Licensor of One per cent (1%) of Licensee's selling price of all of such other gypsum product or products (in the manufacture of which said process or processes are used), manufactured and sold by Licensee, upon the same terms as set forth herein and subject to all of the conditions hereof, in which event in the agreement for the same there shall be substituted for the words "gypsum board" the name of such other product or products. An agreement containing all of said terms and conditions shall be reduced to writing and signed by both parties before the same shall become effective.

16. This Agreement shall be effective as of the —— day of ——, 1949.

In witness whereof the parties hereto have caused these presents to be signed in duplicate by their respective presi- [fol. 706] dents, attested by their respective secretaries, and their corporate seal to be hereunto affixed, the day and year first above written.

United States Gypsum Company, By —— ——, President.

Attest: —— ——, Secretary.

—— ——, President.

Attest: —— ——, Secretary.

[fol. 707] LICENSE AGREEMENT

This agreement, made this —— day of ——, A. D. 1949, by and between United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as Licensor, and ——, a —— corporation, of ——, hereinafter referred to as Licensee,

Witnesseth:

That, whereas, Licensor is the owner of United States Letters Patent No. 1,938,354 relating to a perforated gypsum board particularly adapted for fire-resistant wall and ceiling construction and structures as covered by the claims of said patent; and

Whereas, Licensee desires an indivisible and non-exclusive license from Licensor herein, to manufacture, use and sell perforated gypsum board embodying the inventions and improvements set forth and claimed in said Letters Patent No. 1,938,354 upon the terms and conditions hereinafter set forth;

Now, Therefore, in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto agree as follows, to-wit:

1. Licensor agrees to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license and privilege of manufacturing, at the plants or factories now or hereafter owned or operated by Licensee or any subsidiary, associated or affiliated company, perforated gypsum board embodying the inventions and improvements set forth and claimed in said Letters Patent No. 1,938,354, and of selling and using in the United [fol. 708] States of America, and the territories and possessions thereof, said perforated gypsum board manufactured by Licensee as aforesaid, for the full term of said Letters Patent, including any reissue thereof.

2. Licensee agrees to pay to Licensor for the right and privilege granted under Paragraph 1 above a license fee or royalty, for all perforated gypsum board, embodying any of the inventions and improvements set forth and claimed in said Letters Patent, which is manufactured and

sold by Licensee during the term hereof, at the rate of ten cents (10¢) per thousand square feet of surface area, provided that no license fee or royalty shall be payable on perforated gypsum board exported by Licensee to any foreign country.

3. The license herein granted shall be personal to the Licensee and shall not be sold, assigned or transferred, either voluntarily or by operation of law, without the written consent of Licensor; *Provided, however,* that the license may be assigned by Licensee to any company acquiring all of Licensee's gypsum and gypsum board business, and assets pertaining thereto, or all of the capital stock of Licensee, on condition that Licensee shall first obtain, and deliver to Licensor, such assignee's written agreement to assume all of the obligations of Licensee hereunder and agreeing to be bound by all of the terms and conditions hereof.

4. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of perforated gypsum board manufactured and sold by it under the right, license and privilege herein granted, and [fol. 709] agrees that on or before the 20th day of each calendar month it will deliver to Licensor at its office in Chicago, Illinois, true written returns, verified under oath by an officer or other authorized agent of Licensee setting forth the quantity of all such perforated gypsum board manufactured by it, and sold during the preceding calendar month. Licensee also agrees to pay to Licensor at its said office on or before the 20th day of each calendar month the hereinbefore stipulated royalties or license fees which may then be due under the terms of this agreement on account of all such perforated gypsum board manufactured by it, and sold during the preceding calendar month.

5. Licensor, or its duly authorized representative, shall have the right at all reasonable times to inspect the books of account and records of Licensee referred to in Paragraph 4 hereof, and to make copies thereof and memoranda therefrom, *provided, however,* that upon written request of Licensee, such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne equally

by the parties. If the parties fail to agree upon the certified public accountant to make such examination, then Licensor shall name three certified public accountants of good standing, not directly or indirectly employed by it or in any other manner connected with it, and if Licensee shall not accept any one of them, then Licensor shall have the right to make such examination itself.

6. Licensee agrees that all perforated gypsum board manufactured and sold by it under or embodying any of the claims of said Letters Patent shall be distinctly marked [fol. 710] "Patent No. 1,938,354", and with the further words "Licensed under the above patent". Licensee further agrees to distinctly mark said perforated gypsum board with such other appropriate notice as Licensor shall specify from time to time.

7. In the event either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements to be kept or performed by it under the provisions hereof, then the other party may at its election serve upon the party in default written notice of intention to terminate this license and specifying the alleged default. If the party in default shall not cure the default so specified within thirty (30) days thereafter, then the other party may, subject to the provisions of paragraph 8 below, cancel and terminate this agreement without any court action by serving upon the party in default written notice of its election so to do; provided, that neither party shall be relieved thereby from any liability accrued at the time of such termination.

8. If a party upon whom a default notice is served under Paragraph 7 above shall deny the specified defaults, in whole or in part, then the right of the other party to terminate this license by reason of the defaults alleged shall be suspended, provided the party served shall (a) within the said thirty (30) day period provided in Paragraph 7 above cure any defaults which are not denied, and (b) submit to arbitration the question as to whether the specifically denied defaults in fact occurred. In the event the arbitrators find that one or more of the alleged defaults have occurred, then the party in default shall cure the same within thirty (30) days from the date of the find-

[fol. 711] ing of such arbitrators. If not cured within said period the party serving such default notice, in addition to and without limitation upon any other rights and remedies which it may have hereunder, may cancel and terminate this agreement without any court action by serving upon the party in default written notice of its election so to do; provided, that neither party shall be relieved thereby of any liability accrued at the time of such termination.

All arbitrations had under this Paragraph 8 shall be in accordance with the Rules then obtaining of the American Arbitration Association, excepting only that the time allowed for objecting to arbitrators, or indicating the order of preference for arbitrators, as submitted to the parties for such purpose by said Association or under its Rules, shall in no event be less than fifteen (15) days. The finding or findings of the arbitrators shall be final and conclusive. In the event the arbitrators shall find any license fees or royalties, or other sums of money herein required to be paid by the Licensee to the Licensor, are due and owing, the arbitrators shall in their findings fix and determine the amount thereof, and Licensor shall have the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the Arbitrators in any court of competent jurisdiction.

9. In the event the Licensee at any time be adjudicated a bankrupt, then the license hereunder shall immediately be and become cancelled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination.

[fol. 712] 10. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any other or further breach or breaches. Either party may specifically enforce this contract, or any of the terms, conditions and covenants thereof, by injunction or in such other manner as may be permitted by law.

11. Any notice required or permitted to be served by either party upon the other under the terms hereof, may be served by mailing the same to the other party, postage prepaid and registered, addressed to such other party at

its last known principal office, and the deposit of such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder.

12. In case Licensor shall grant to any other person any license under the aforesaid Letters Patent for the manufacture, sale or use of perforated gypsum board embodying the claims or inventions claimed in said patent, or shall grant any right under any such license, upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms or extend to it the same right granted to any such other person.

13. Nothing herein contained shall be construed as granting any right, license or privilege under any Letters Patent other than Letters Patent No. 1,938,354, and it is understood that the royalties provided herein are in addition to the royalties or license fees provided under any other license agreement which may now or hereafter exist between the parties.

14. This agreement shall be effective as of the —— day of ——, 1949.

[fol. 713] In witness whereof the parties hereto have caused these presents to be signed in duplicate by their respective presidents, attested by their respective secretaries, and their corporate seals to be hereunto affixed, the day and year first above written.

United States Gypsum Company, By —— ——, President.

Attest: —— ——, Secretary.

—— ——, President.

Attest: —— ——, Secretary.

[fol. 714] LICENSE AGREEMENT

This agreement made this —— day of ——, A. D. 1949, by and between United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as Licensor, and ——, a —— corporation, of ——, hereinfter referred to as Licensee,

Witnesseth:

That in consideration of the mutual covenants and agreements herein contained, the parties hereto agree as follows, to-wit:

1. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license, and privilege to make and use the machines and inventions set forth and claimed in United States Letters Patent No. 1946056 dated February 6, 1934, and expiring February 6, 1951, at the plants or factories now owned or operated by Licensee, or at any other plant or factory hereafter owned or operated and controlled by Licensee or any subsidiary, associated or affiliated company of Licensee, for the full term of said letters patent, including any reissue therefor.

2. Licensee agrees to pay to Licensor for the right and privilege granted under Paragraph 1 above a license fee or royalty of ten cents (10¢) per one thousand (1,000) square feet of gypsum board bundled with a machine constructed according to any one or more of the claims set forth or claimed in said letters patent, and sold by Licensee during the term hereof.

[fol. 715] 3. The license herein granted shall be personal to the Licensee and shall not be sold, assigned, or transferred, either voluntarily or by operation of law, without the written consent of Licensor, *provided, however,* that this license may be assigned by Licensee to any company acquiring all of Licensee's gypsum and gypsum board business, and assets pertaining thereto, or all of the capital stock of Licensee, on condition that Licensee shall first obtain, and deliver to Licensor, such assignee's written agreement to assume all of the obligations of Licensee hereunder, and agreeing to be bound by all of the terms and conditions hereof.

4. Licensee agrees to keep separate, full, and accurate books of account and records showing the exact quantity of all gypsum board bundled with a machine constructed according to any one or more of the claims set forth and claimed in said letters patent, and sold by Licensee, and agrees that on or before the 20th day of each calendar

month it will deliver to Licensor at its office in Chicago, Illinois, true written returns verified under oath by an officer or other authorized agent of Licensee, setting forth the quantity of all such gypsum board bundled by it with a machine constructed according to any one or more of the claims set forth in said letters patent, and sold during the preceding calendar month. Licensee also agrees to pay to Licensor at its said office, on or before the 20th day of each calendar month, the hereinbefore stipulated royalty or license fee which may then be due under the terms of this agreement on account of said gypsum board bundled by it as aforesaid, and sold during the preceding calendar month.

[fol. 716] 5. Licensor, or its duly authorized representative, shall have the right at all reasonable times to inspect the books of account and records of Licensee referred to in Paragraph 4 hereof, and to make copies thereof and memoranda therefrom, provided that upon written request of Licensee such examination shall be made by a certified public accountant satisfactory to Licensor, in which event the expense of such examination shall be borne equally by the parties.

6. Licensee agrees that all bundles of gypsum board bundled by it with a machine constructed according to any one or more of the claims set forth and claimed in said letters patent, shall be distinctly marked "Machine used in making this bundle covered by Patent No. 1,946,056," and Licensee further agrees to distinctly mark said bundles with such other appropriate notice as Licensor shall specify from time to time.

7. In the event either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein agreed to be kept or performed by it, then the other party may at its election serve upon the party in default written notice of intention to terminate this license, which notice shall specify the alleged default. If the party in default shall not cure the default so specified within thirty (30) days after such notice, then the other party may, subject to the provisions of Paragraph 8 below, cancel and terminate this agreement, without any court action, by serving upon the party in default written

notice of its election so to do; provided, that neither party shall be relieved thereby from any liability accrued at the time of such termination.

[fol. 717] 8. If a party upon whom a default notice is served under Paragraph 7 above shall deny the specified defaults, in whole or in part, then the right of the other party to terminate this license by reason of the defaults alleged shall be suspended, provided the party served shall (a) within the said thirty (30) day period provided in Paragraph 7 above cure any defaults which are not denied, and (b) submit to arbitration the question as to whether the specifically denied defaults in fact occurred. In the event the arbitrators find that one or more of the alleged defaults have occurred, then the party in default shall cure the same within thirty (30) days from the date of the finding of such arbitrators. If not cured within said period the party serving such default notice, in addition to and without limitation upon any other rights and remedies which it may have hereunder, may cancel and terminate this agreement, without any court action, by serving upon the party in default written notice of its election so to do; provided, that neither party shall be relieved thereby of any liability accrued at the time of such termination.

All arbitrations had under this Paragraph 8 shall be in accordance with the Rules then obtaining of the American Arbitration Association, excepting only that the time allowed for objecting to arbitrators or indicating the order of preference for arbitrators, as submitted to the parties for such purpose by said Association or under its Rules, shall in no event be less than fifteen (15) days. The finding or findings of the arbitrators shall be final and conclusive. In the event the arbitrators shall find that any li-

[fol. 718] cense fees or royalties, or other sums of money herein required to be paid by the Licensee to the Licensor, are due and owing, the arbitrators shall in their findings fix and determine the amount thereof, and Licensor shall have the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the arbitrators in any court of competent jurisdiction.

9. In the event the Licensee shall at any time be ajudi-

cated a bankrupt, then the license hereunder shall immediately be and become cancelled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination.

10. Nothing herein contained shall be construed as constituting a license for the manufacture, use or sale of gypsum board under any other patents or patent rights of Licensor, or as extending the term of any such license heretofore or hereafter granted by any other agreement between the parties hereto, and the royalty provided herein is in addition to any royalties or license fees provided in any such other agreement.

11. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any other or further breach or breaches. Either party may specifically enforce this contract, or any of the terms, conditions and covenants thereof, by injunction or in such other manner as may be permitted by law.

[fol. 719] 12. Any notice required or permitted to be served by either party upon the other under the terms hereof, may be served by mailing the same to the other party, postage prepaid and registered, addressed to such party at its last known principal office, and the deposit of such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder.

13. In case Licensor shall grant to any other person a license under the aforesaid patent upon terms more favorable than those granted hereunder to this Licensee, then it will grant to the Licensee herein a license on the same terms granted to any such other person.

14. The term "gypsum board" shall be understood to mean all board made of gypsum, by whatever name called, having the characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths and all other gypsum boards.

15. This agreement shall be effective as of the —— day of ——, 1949.

In witness whereof the parties hereto have caused these presents to be signed by their respective presidents, attested by their respective secretaries, and their corporate seals to be hereunto affixed in duplicate the day and year first above written.

United States Gypsum Company, By —— ——, President.

Attest: —— ——, Secretary.

By —— ——, President.

Attest: —— ——, Secretary.

[fol. 720] LICENSE AGREEMENT

This agreement, made this —— day of ——, A. D. 1949, by and Between United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as Licensor, and ——, a —— corporation, of ——, hereinafter referred to as Licensee,

Witnesseth:

That, whereas, Licensor is the owner of United States Letters Patent No. 1,914,345 relating to wall construction (hereinafter referred to as the Roos Patent) and is also the owner of certain patent rights set forth in Schedule A hereunto annexed, relating to building structures or elements for said structures; and

Whereas, Licensee desires an indivisible and non-exclusive license from Licensor herein, to manufacture, use and sell gypsum board under said Roos Patent and under said patent rights set forth in Schedule A hereof, and Licensor has agreed to grant such license upon the terms and conditions, but subject to the limitations hereinafter stated;

Now, therefore, in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto agree as follows, to-wit:

1. Licensor agrees to and does hereby give and grant unto Licensee the indivisible and non-exclusive right, license, and privilege to make, use, and sell gypsum board

having a metallized surface, embodying the inventions disclosed and claimed in said Roos Patent and in the patents set forth in Schedule A, or in any of them; Provided, that the right, license, and privilege herein and hereby [fol. 721] granted is specifically limited to the gypsum board and building structures incorporating the same as set forth in Schedule A, and does not extend to any other product or structure.

2. Licensee agrees to pay to Licensor for the right and privilege granted under Paragraph 1 above, a royalty for all gypsum board having a metallized surface manufactured and sold by Licensee and which is covered by the claims of said Roos Patent or the patents set forth in Schedule A, or which is to be used in making structures covered by said patent or patent rights, at the rate of forty cents (40¢) per thousand square feet of surface area where only one face is metallized, and at the rate of fifty cents (50¢) per thousand square feet where both faces are metallized, of any product covered by the aforesaid patent or any of said patent rights.

3. The license herein granted is personal to the Licensee and shall not be sold, assigned or transferred, either voluntarily or by operation of law, without the written consent of Licensor; Provided, however, that the license may be assigned by Licensee to any company acquiring all of Licensee's gypsum and gypsum board business, and assets pertaining thereto, on condition that Licensee shall first obtain, and deliver to Licensor, such assignee's written agreement to assume all of the obligations of Licensee hereunder and agreeing to be bound by all of the terms and conditions hereof.

4. In case Licensor shall grant to any other person any license under the aforesaid patent or patent rights for the manufacture, sale or use of gypsum board having a metallized surface and embodying the claims or inventions set forth and claimed therein, upon terms more favorable than [fol. 722] those granted hereunder to Licensee, then Licensor shall grant to Licensee a license upon the same terms, or will extend to Licensee the same right granted to such other licensee.

5. Licensee agrees to keep true and accurate books of account showing the quantity of all gypsum board having one or more metallized surfaces, manufactured and sold by it under the rights, licenses, and privileges herein granted. Such books and records shall at all times during business hours be open to the inspection of Licensor or its duly authorized representative, and Licensor shall have the right to make copies thereof and memoranda therefrom, provided that upon written request of Licensee such examination shall be made by a certified public accountant satisfactory to Licensor, in which event the expense thereof shall be borne equally by the parties.

6. Licensee agrees that on or before the 15th day of each calendar month it will deliver to Licensor at its office in Chicago, Illinois, a written report, verified by an officer or other authorized agent of Licensee, showing the quantity of all such gypsum board manufactured by it (a) having one metallized surface, and (b) having two metallized surfaces, and sold during the preceding calendar month. Licensee also agrees to pay to Licensor at its said office on or before the 15th day of each calendar month the hereinbefore stipulated royalty which may then be due under the terms of this agreement on account of all such gypsum board so sold by Licensee during the preceding calendar month. For the purposes of this agreement a sale shall be considered to have been made not later than the date on which the goods are shipped by Licensee, without regard to passing of title or whether the goods are shipped on consignment, or otherwise.

[fol. 723] 7. Licensee agrees that all gypsum board having one or more metallized surfaces sold by it hereunder shall be distinctly marked with the word "Patent" followed by the number of any of the aforesaid patents, the claims of which are embodied in said gypsum board, and with the words "Wall structures having hollow spaces faced by said metallized surfaces, also covered by Patent No. 1,914,345"; and also with the words "Licensed under the above patents". Licensee further agrees to distinctly mark said gypsum board with such other appropriate notice as Licensor shall specify from time to time.

8. In the event Licensee shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements to be kept or performed by it under the provisions hereof, then Licensor may at its election serve upon Licensee written notice specifying the alleged default and stating, if Licensor so desires, its intention to terminate this license. If Licensee shall not cure the default so specified within thirty (30) days thereafter, then Licensor may, subject to the provisions of Paragraph 9 below, maintain any appropriate action hereunder, at law or in equity, for collection of royalties, or for damages, or for any other appropriate remedy, or Licensor may, if such intention was stated in the notice of default, cancel and terminate this agreement without any court action, by serving upon Licensee written notice of its election so to do; provided, that Licensee shall not be relieved thereby from any liability accrued at the time of such termination.

9. If Licensee shall deny, in whole or in part, the defaults specified in a notice served by Licensor under Paragraph 8 above, then Licensor's right to proceed as provided [fol. 724] in Paragraph 8 above shall be suspended, provided Licensee shall (a) within the said thirty (30) day period provided in Paragraph 8 above cure any defaults which are not denied, and (b) submit to arbitration the question as to whether the specifically denied defaults in fact occurred. In the event the arbitrators find that one or more of the alleged defaults have occurred, then Licensee shall cure the same within thirty (30) days from the date of the finding of such arbitrators. If not cured within said period then Licensor may proceed in such manner as it may elect as provided in Paragraph 8 above.

All arbitrations had under this Paragraph 9 shall be in accordance with the Rules then obtaining of the American Arbitration Association, excepting only that the time allowed for objecting to arbitrators, or the order of preference for arbitrators, as submitted to the parties for such purpose by said Association or under its Rules, shall in no event be less than fifteen (15) days. The finding or findings of the arbitrators shall be final and conclusive. In the event the arbitrators shall find any royalties, or

other sums of money herein required to be paid by the Licensee to the Licensor, are due and owing, the arbitrators shall in their findings fix and determine the amount thereof, and Licensor shall have the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the arbitrators in any court of competent jurisdiction.

10. In the event (a) that Licensee shall be adjudicated a bankrupt, or (b) a receiver shall be appointed for Licensee, whose appointment shall not be vacated within sixty [fol. 725] (60) days thereafter, then the rights, licenses, and privileges herein granted to Licensee shall forthwith cease and determine, without further action on the part of the Licensor, provided that such termination shall not relieve Licensee of any liability then existing.

11. The waiver by Licensor of any breach on the part of Licensee shall not be interpreted as constituting a waiver of any further or other breach or breaches.

12. Any notice required or permitted to be served by either party upon the other under the terms hereof, may be served by mailing the same to the other party, postage prepaid and registered, addressed to such party at its last known principal office, and the deposit of such notice in the United States mails, registered, postage prepaid and so addressed, shall constitute service of notice hereunder.

13. The term "gypsum board" shall be understood to mean all board made of gypsum, by whatever name called, having the characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths, laminated gypsum board, and all other gypsum boards.

14. Except as otherwise provided herein, this agreement shall remain in force for the full term of the last to expire of the Roos Patent and the patent rights set forth in Schedule A, and shall be binding upon and inure to the benefit of the parties hereto and their successors and assigns; provided that nothing in this paragraph contained shall be construed to permit any assignment hereof except as herein otherwise specifically provided.

Nothing herein contained shall be construed to relieve Licensee from the payment of royalties under license [fol. 726] agreement of even date herewith under Letters Patent Nos. 2017022, 2079338, 2080009, and 1938354, it being understood that the royalties provided herein are in addition to the royalties or license fees provided in such other agreement. In the event the exclusive right and license of Licensor as set forth in Schedule A hereof shall terminate for any reason whatever, whether on account of Licensor's default or otherwise, and such termination shall result in the termination of any of the rights, licenses and privileges herein granted to the Licensee, then this agreement shall immediately terminate without further act on the part of either of the parties hereto (subject however to revival and continuation as hereinafter provided), and without liability of any kind by Licensor to Licensee on account thereof, provided that Licensee shall not thereby be released from any then existing liability to Licensor. Licensor agrees that if its said exclusive right and license shall be so terminated, it will promptly notify Licensee thereof and, if Licensee's rights shall have terminated as aforesaid, then upon the written request of Licensee made to Licensor at any time within sixty (60) days after the giving of such notice, this license agreement shall continue in effect as to said Roos Patent, upon and subject to all the terms, provisions, and conditions hereof to the extent the same are applicable; provided however, that in such event it is expressly understood and agreed that Licensor shall not be liable to Licensee in any [fol. 727] way, directly or indirectly, for or by reason of any infringement or claimed infringement of the patents listed in Schedule A hereof.

15. Licensor hereby represents and warrants that it has the right to grant the license herein granted.

16. This agreement shall be effective as of the —— day of ——, 1949.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their cor-

porate seals to be hereunto affixed, in duplicate, the day and year first above written.

United States Gypsum Company, By —— ——, President.

Attest: —— ——, Secretary.

By —— ——, President.

Attest: —— ——, Secretary.

[fol. 727-A] SCHEDULE A

Licensor has the exclusive right and license to make, use and sell building structures or elements for building structures where insulation is obtained by the use of gypsum board having a metallized surface under the following patents, known as the Alfol patents:

Inventor	*Patent No.*	*Issue Date*
Schmidt	1,890,418	December 6, 1932
Dykerhoff	1,934,174	November 7, 1933
Schmidt	2,015,817	October 1, 1935

together with any divisions, continuations, renewals or reissues thereof, but it is understood that the term "building structures" is limited to the walls, floors, roofs and ceilings of buildings and does not include pipes or ducts, or other heating apparatus installed in the building, or refrigerating or cooling apparatus or structures built into the building or not. Licensor has no right or license under the said patents to use metal foil for insulation except where such foil is applied to a nonmetallic member as a facing therefor.

[fol. 728] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOT THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM Company; Certain-teed Products Corporation; The Celotex Corporation; Ebsary Gypsum Company, Inc.; Newark Plaster Company; Samuel M. Gloyd, Doing Business Under the Name of Texas Cement Plaster Company; Sewell L. Avery; Oliver M. Knode; Melvin H. Baker; Henry J. Hartley; and Frederick Tomkins, Defendants

PRELIMINARY STATEMENT AND DECREE—November 7, 1949

This cause came on for trial before this Court on November 15, 1943. At the conclusion of plaintiff's presentation of the case, defendants moved, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, for judgment dismissing the complaint on its merits. The motion of defendants was granted August 6, 1946. The judgment so rendered by this Court was reversed by the Supreme Court of the United States, and the case was remanded to this Court for further proceedings in conformity with the opinion of the Supreme Court (333 U. S. 364).

Following the remand, the plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, moved for summary judgment in its favor upon the pleadings and all of the proceedings which theretofore had been had in the case, or, in the alternative, for such further proceedings as this Court might direct, and defendants, by direction of the Court, filed proffers of proof.

[fol. 729] Argument by counsel for the respective parties upon the motion of plaintiff was heard by the Court, and after due consideration of such argument and of defend-

ants' proffers of proof, Garrett, J. and Jackson, J., constituting a majority of the Court, announced a ruling to the effect that plaintiff's motion for summary judgment would be granted, and Stephens, J., who presided during the trial, announced his dissent from such ruling.

Thereafter counsel for plaintiff and counsel for certain of the defendants submitted forms of final decrees for the consideration of the Court and also suggested findings of fact, the latter to be considered in the event the Court should deem it necessary to make any findings of fact additional to those originally found by it and to those stated in the opinion of the Supreme Court.

In due course, the Court heard arguments respecting the proposed decrees and the suggested findings of fact, and full consideration has been given thereto and to all prior proceedings—all being considered in the light of the decision of the Supreme Court which, as understood by the majority of this Court, held that the defendants acted in concert to restrain trade and commerce in the gypsum board industry and monopolized said trade and commerce among the several states in that section hereinafter referred to as the eastern territory of the United States, which section embraces all the states of the United States westward from the eastern coast thereof to the Rocky Mountains and including New Mexico, Colorado, Wyoming, and the eastern half of Montana.

Decree

The motion of plaintiff for a summary judgment is sustained and in conformity with the decision of the Supreme Court, as understood by the majority of this Court, and in obedience to its mandate, it is ordered, adjudged [fol. 730] and decreed:

Article I

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states a cause of action against defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies",

commonly known as the Sherman Antitrust Act, and acts amendatory thereof and supplemental thereto.

Article II

As used in this decree:

1. "Defendant companies" shall mean all of the corporate defendants and Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company.

2. The "Patents" shall mean United States Letters Patent and applications for United States Letters Patent owned by Defendant United States Gypsum Company which are described in the Patent Licenses, as hereinafter defined, and continuations in whole or in part, renewals, reissues, divisions, and extensions thereof.

3. "Gypsum board" shall mean plaster board or lath (including perforated and metallized lath) and wallboard (including metallized wallboard) made from gypsum and embodying any of the inventions or improvements set forth and claimed in any of the Patents.

4. "Patent Licenses" shall mean the patent license agreements which were in effect between defendant United States Gypsum Company and each of the other defendant companies at the time the complaint herein was filed and described in said complaint as follows:

Agreement dated October 15, 1929, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee;

[fol. 731] Agreement dated October 17, 1929, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee;

Agreement dated October 18, 1929, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee;

Agreement dated November 5, 1929, between United States Gypsum Company, as licensor, and Universal Gypsum and Lime Company (National Gypsum Company, as Assignee), as licensee;

Agreement dated November 25, 1929, between United States Gypsum Company, as licensor, and American

Gypsum Company (The Celotex Corporation, as Assignee), as licensee;
Agreement dated April 23, 1930, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Co., as Assignee), licensee;
Agreement dated February 10, 1937, between United States Gypsum Company, as licensor, and Texas Cement Plaster Company, as licensee;
Agreement dated October 5, 1934, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee (Metallized board);
Agreement dated October 12, 1934, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Metallized board);
Agreement dated November 2, 1934, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Metallized board);
Agreement dated December 4, 1934, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee, as licensee (Metallized board);
Agreement dated August 14, 1935, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Metallized board);
Agreement dated June 8, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);
Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);
[fol. 732] Agreement dated February 2, 1937, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);
Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);
Agreement dated June 23, 1937, between United States Gypsum Company, as licensor, and Kelley Plaster-

board Company (Newark Plaster Company, as Assignee), as licensee (Perforated lath);
Agreement dated January 3, 1939, between United States Gypsum Company, as licensor, and Newark Plaster Company, as licensee (perforated lath), and any supplement or amendment to any of said patent license agreements.

Article III

The defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of sections 1 and 2 of the Sherman Antitrust Act.

Article IV

Each of the license agreements listed in Article II hereof is adjudged unlawful under the anti-trust laws of the United States and illegal, null and void.

Article V

Each of the defendant companies and each of their respective officers, directors, agents, employees, representatives, subsidiaries, and any person acting or claiming to act under, through or for them or any of them are hereby enjoined and restrained from

(1) the further performance or enforcement of any of the provisions of the Patent Licenses, including any price bulletin issued thereunder;
[fol. 733] 2. entering into or performing any agreement or understanding among the defendants or any of them for the purpose or with the effect of continuing, reviving or reinstating any monopolistic practice.

(3) entering into or performing any agreement or understanding among the defendants or any of them in restraint of trade and commerce in gypsum board among the several states in the eastern territory of the United States by license agreements to fix, maintain

or stabilize prices of gypsum board or the terms and conditions of sale thereof.

Article VI

1. Defendant United States Gypsum Company is hereby ordered and directed to grant to each applicant therefor within 90 days after the effective date hereof, but only in so far as it has the right to do so, a non-exclusive license to make, use and vend under any, some, or all patents and patent applications now owned or controlled by it relating to gypsum board, provided that such license agreement fixes a royalty not to exceed the royalty on the same article or process fixed in the license agreements set out in Article II hereof.

2. Defendant United States Gypsum Company is hereby enjoined and restrained from making any sale or other disposition of any of said patents or patent applications which would deprive it of the power or authority to grant such licenses, unless in any sale, transfer or assignment it shall be required that the purchaser, transferee or assignee shall observe the provisions of this section.

Article VII

Nothing contained in this decree shall be deemed to have any effect upon the operations or activities of said [fol. 734] defendants which are authorized or permitted by the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or the Act of Congress of August 17, 1937, commonly called the Miller-Tydings Act, or by any present or future act of Congress or amendment thereto; provided, however, nothing contained in this article shall in any manner affect the provisions of Article VI of this decree.

Article VIII

The forms of license agreement which the Court has this day ordered filed herein are hereby approved; and the tender by defendant United States Gypsum Company to each applicant for a license agreement containing the terms and conditions set forth in the applicable filed form or forms shall constitute compliance by defendant United States Gypsum Company with the provisions of Article VI.

Article IX

Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this decree, or any other person, firm or corporation that may hereafter become bound thereby in whole or in part, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of this decree, and (2) for the enforcement of compliance therewith.

Article X

Judgment is entered against the defendant companies for 50% of the costs to be taxed in this proceeding, and the costs so to be taxed are hereby prorated against the [fol. 735] several defendant companies as follows:

United States Gypsum Company	55%
National Gypsum Company	23%
Certain-teed Products Corporation	11%
The Celotex Corporation	3%
Ebsary Gypsum Company, Inc.	3%
Newark Plaster Company	4%
Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company	1%

Let the decree be entered.

(S.) Finis J. Garrett, J., (S.) Joseph R. Jackson, J.

STEPHENS, *J.*, dissents from the entry of a summary judgment against the defendants. In his view the defendants should be permitted to present their offered proof upon the issues of fact raised by their answers to the Government's complaint, and the court should then hear argument from counsel for the parties and, after weighing the evidence of both the Government and the defendants, make findings of fact and conclusions of law anew and render judgment according thereto.

(S.) Harold M. Stephens, J.

Dated: November 7, 1949.

[fol. 736] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
UNITED STATES

v.

UNITED STATES GYPSUM COMPANY, ET AL.

OPINION BY STEPHENS, J., ON MOTION FOR SUMMARY JUDGMENT—Filed November 7, 1949

STEPHENS, *J.*: I think that the entry of a summary judgment against the defendants is not warranted. The case was before the Supreme Court for review of the correctness of the trial court's mid-trial dismissal, under Rule 41 (b), Federal Rules of Civil Procedure, of the Government's complaint. The dismissal was after the Government had completed presentation of the evidence which it relied upon to sustain the charges in its complaint, but before any evidence had been presented by the defendants. As I read its opinion the Supreme Court determined that the Government's evidence established *prima facie* the violations of the Sherman Act, or some of them, charged in the Government's complaint. But these charges—outlined in paragraphs 44-46(a) inclusive, and detailed in paragraphs 47-123 inclusive, of the complaint are denied by the defendants' answers.[1] Hence

[1] The charges reduce themselves in essence to the following: (1) That the license contracts entered into between the defendant USG, as licensor, and the other defendants, as licensees, are themselves illegal as in restraint of trade in view of the nature of the patents upon which the contracts are based, in view of the fact that USG and the plurality of defendant licensees manufacture all of the gypsum board in the "Eastern area," and in view of the terms and conditions of the contracts, including those providing for the establishment of minimum prices on patented gypsum board to be made and sold by the defendants. (2) That the license contracts, even if valid on their face, were not entered into as bona fide license agreements, reasonably designed to secure to USG the pecuniary

there remain in the case genuine issues of material fact. This forbids the entry of a summary judgment for [fol. 737] under Rule 56 (c), Federal Rules of Civil Procedure, such a judgment can be rendered only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ." And I think that in setting aside the trial court's findings of fact and in saying that "By the record *now presented*" violation of the Sherman Act is clear and in saying that, as the order of dismissal came at the end of the Government's presentation on defendants' motion to dismiss under Rule 41 (b), "the order is reversed and the case remanded *for further proceedings in conformity with this opinion,*"[2] the Supreme Court meant that the defendants' evidence should be heard and the case disposed of by the trial court upon the merits on the issues raised by the complaint and the answers and upon findings of fact and

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reward for valid patent monopolies, but were executed by the defendants merely to give color of legality to a combination to restrain trade, by control of the prices and terms and conditions of sale of gypsum board, plaster, and miscellaneous gypsum products throughout the gypsum industry. (3) That the defendants' operations were carried beyond the proper limits of a patent monopoly and licensing thereunder by raising and fixing at arbitrary and noncompetitive levels the price of gypsum board made and sold by the defendants, by improper standardization of gypsum board and its method of production, by raising, maintaining and stabilizing the level of prices of unpatented materials—plaster and miscellaneous gypsum products—by effectuating improper restriction upon distribution of gypsum board, plaster and miscellaneous gypsum products, and by fixing the prices at which manufacturing distributors resold gypsum board. (4) That the patents, or some of them, upon which such license agreements were purportedly based are invalid.

[2] *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 401, 402 (1948); italics supplied.

conclusions of law to be made anew after a weighing of all of the evidence, *i.e.*, that to be presented by the defendants as well as that which has been introduced by the Government. It is in my view not to be thought that the Supreme Court contemplated denial to the defendants of their day in court upon the issues raised by the pleadings. But that is the effect of the summary judgment; the defendants have made offers of proof but they are not to be permitted to present evidence. It is true that it is without dispute in the case that patent licenses with price fixing limitations were executed by the defendants, that these licenses were, in the large, adhered to by each defendant with knowledge of the adherence of others, and that they were industry wide; and these undisputed facts were adverted to by the Supreme Court in the course of its opinion ruling that a *prima facie* case of conspiracy to violate the Sherman Act had been made out by the Government. But I do not read the opinion of the Court as ruling that such a plurality of patent licenses is, without more, conclusive, rather than merely *prima facie,* evidence [fol. 738] of a violation of the Sherman Act. Had the Court regarded such a plurality of licenses, without more, as conclusive evidence of a violation of the Act it would I think have overruled *United States* v. *General Electric Company,* 272 U.S. 476 (1926). This it did not do either in its decision in the instant case or in *United States* v. *Line Material Co.,* 333 U.S. 287 (1948). In the latter case the Sherman Act violation found by the Supreme Court was laid by it to the cross-licensing of the Lemmon and Schultz patents, not to the admitted plurality of licenses with price fixing provisions entered into, as the Court said, as the result of arm's length bargaining although with knowledge on the part of each licensee of price provisions in the licenses of others.

I think therefore that the defendants should be permitted to present their offered proof on the issues of fact raised by their answers to the Government's complaint and that the court should then hear argument by counsel for the parties and should, after weighing the evidence of both the Government and the defendants, make findings of fact and

conclusions of law anew and then render judgment according thereto.

(S.) Harold M. Stephens, J.

November 7, 1949.

[fol. 739] LICENSE AGREEMENTS—Filed November 7, 1949

This agreement, made this —— day of ——, A. D. 1949, by and between United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as Licensor, and ——, a —— corporation, of ——, hereinafter referred to as Licensee,

Witnesseth:

that

Whereas, Licensee desires to obtain a license to make, use and sell gypsum board made according to the processes or embodying the claims of one or more of the hereinafter mentioned patents, owned by Licensor, through the full term thereof and Licensor has agreed to grant such license upon the terms and conditions hereinafter stated;

Now, therefore, in consideration of the sum of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged, and of the mutual covenants and agreements hereinafter contained, the parties hereto have agreed as follows, to-wit:

1. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license, and privilege to use the process or processes, and inventions and improvements claimed in any and all of the following letters patent:

Patent Number	*Date*	*Expiration Date*
2017022	October 8, 1935	October 8, 1952
2079338	May 4, 1937	May 4, 1954
2080009	May 11, 1937	May 11, 1954

in the manufacture of gypsum board as hereinafter defined, [fol. 740] at the plants or factories now owned or operated by Licensee, or at any other plant or factory hereafter owned or operated by it or any subsidiary, associated or

affiliated company, and of manufacturing at any such place or places, selling and using in the United States of America, and the territories and possessions thereof, gypsum board manufactured under the processes or embodying the inventions and improvements claimed in said patents, for the full term of the last to expire of said letters patent, including any reissues thereof.

Licensor also agrees promptly to disclose to Licensee all information and formulae, not heretofore disclosed to Licensee, which it now has or may obtain relating to the process of making a cellular product through the formation of tenacious foam and mixing the foam with a cementitious material, as set forth and claimed in applications for United States Letters Patent as originally filed by Carlisle K. Roos, Serial Nos. 733197, 3477, and 142155, and by Erik C. Bayer, Serial No. 661723, or in Letters Patent Nos. 2017022, 2079338, and 2080009, in so far as the same is or may be applied to gypsum, and including all information and formulae for the manufacture of gypsum board embodying the inventions and improvements set forth and claimed in the aforesaid applications or letters patent.

2. Licensee agrees to pay to Licensor for the right and privilege granted under Paragraph 1 above a license fee or royalty at the rate of —— per cent (——%) of Licensee's selling price of all gypsum board manufactured under any of the processes or embodying any of the inventions covered by said patents and sold by it during the term hereof, provided that no license fee or royalty shall be payable on gypsum board exported by Licensee to any foreign country.

[fol. 741] Licensee's selling price shall mean the net price at Licensee's shipping point after deducting transportation charges and cash discounts allowed by Licensee; provided however, that in the case of laminated gypsum board, except with a metallized surface, the net price for the purposes hereof shall be deemed to be Licensee's net price at the time of sale in the same market area, determined as above provided, for the quantity of plain gypsum board actually used or incorporated therein.

3. The license herein granted shall be personal to the

Licensee and shall not be sold, assigned or transferred, either voluntarily, or by operation of law, without the written consent of Licensor; *Provided, however,* that the license may be assigned by Licensee to any company acquiring all of Licensee's gypsum and gypsum board business, and assets pertaining thereto, or all of the capital stock of Licensee, on condition that Licensee shall first obtain, and deliver to Licensor, such assignee's written agreement to assume all of the obligations of Licensee hereunder and agreeing to be bound by all of the terms and conditions hereof.

4. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of all gypsum board manufactured under any of the processes or embodying any of the inventions covered by said patents and sold by it, together with the Licensee's selling price thereof, and agrees that on or before the 20th day of each calendar month it will deliver to Licensor at its office in Chicago, Illinois, true written returns, verified under oath by an officer or other authorized agent of Licensee setting forth the quantity of all such gypsum board manufactured by it, and sold during the preceding calendar month, together with the selling price [fol. 742] thereof as above defined. Licensee also agrees to pay to Licensor at its said office on or before the 20th day of each calendar month the hereinbefore stipulated royalties or license fees which may then be due under the terms of this agreement on account of all such gypsum board manufactured by it, and sold during the preceding calendar month.

5. Licensor, or its duly authorized representative, shall have the right at all reasonable times to inspect the books of account and records of Licensee referred to in Paragraph 4 hereof, and to make copies thereof and memoranda therefrom, *provided, however,* that upon written request of Licensee, such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne equally by the parties. If the parties fail to agree upon the certified public accountant to make such examination, then Licensor shall name three certified public accountants of

good standing, not directly or indirectly employed by it or in any other manner connected with it, and if Licensee shall not accept any one of them, then Licensor shall have the right to make such examination itself.

6. Licensee agrees that all gypsum board manufactured and sold by it under or embodying the claims of any of such patents shall be distinctly marked with the word "Patent" followed by the numbers of any of the aforesaid patents, the claims of which are embodied in said gypsum board, and Licensee further agrees to distinctly mark said gypsum board with the words "Licensed under the above patents and also under the process claims of patent," followed by the number of any of the aforesaid patents of which any process claimed therein is utilized in the manufacture of said product; and Licensee further agrees to [fol. 743] distinctly mark said gypsum board with any other appropriate notice as Licensor shall specify from time to time.

7. In the event either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements to be kept or performed by it under the provisions hereof, then the other party may at its election serve upon the party in default written notice of intention to terminate this license and specifying the alleged default. If the party in default shall not cure the default so specified within thirty (30) days thereafter, then the other party may, subject to the provisions of paragraph 8 below, cancel and terminate this agreement without any court action by serving upon the party in default written notice of its election so to do; provided, that neither party shall be relieved thereby from any liability accrued at the time of such termination.

8. If a party upon whom a default notice is served under Paragraph 7 above shall deny the specified defaults, in whole or in part, then the right of the other party to terminate this license by reason of the defaults alleged shall be suspended, provided the party served shall (a) within the said thirty (30) day period provided in Paragraph 7 above cure any defaults which are not denied, and (b) submit to arbitration the question as to whether the specifically denied defaults in fact occurred. In the

event the arbitrators find that one or more of the alleged defaults have occurred, then the party in default shall cure the same within thirty (30) days from the date of the finding of such arbitrators. If not cured within said period the party serving such default notice, in addition to and without limitation upon any other rights and remedies which it may have hereunder, may cancel and terminate this agreement without any court action by serv- [fol. 744] ing upon the party in default written notice of its election so to do; provided, that neither party shall be relieved thereby of any liability accrued at the time of such termination.

All arbitrations had under this Paragraph 8 shall be in accordance with the Rules then obtaining of the American Arbitration Association, excepting only that the time allowed for objecting to arbitrators, or indicating the order of preference for arbitrators, as submitted to the parties for such purpose by said Association or under its Rules, shall in no event be less than fifteen (15) days. The finding or findings of the arbitrators shall be final and conclusive. In the event the arbitrators shall find any license fees or royalties, or other sums of money herein required to be paid by the Licensee to the Licensor, are due and owing, the arbitrators shall in their findings fix and determine the amount thereof, and Licensor shall have the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the Arbitrators in any court of competent jurisdiction.

9. In the event the Licensee shall at any time be adjudicated a bankrupt, then the license hereunder shall immediately be and become cancelled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination.

10. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any other or further breach or breaches. Either party may specifically enforce this contract, or any of the terms, conditions and covenants thereof, by injunction or in such other manner as may be permitted by law.

11. Any notice required or permitted to be served by either party upon the other under the terms hereof, may be [fol. 745] served by mailing the same to the other party, postage prepaid and registered, addressed to such other party at its last known principal office, and the deposit of such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder.

12. In case Licensor shall grant to any other person any license under the aforesaid patents for the manufacture, sale or use of gypsum board made by use of the processes or embodying the claims or inventions claimed in any of said patents, or shall grant any right under any such license, upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms or extend to it the same right granted to any such other person.

13. The term "gypsum board" shall be understood to mean all board made of gypsum, by whatever name called, having the characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths, laminated gypsum board, and all other gypsum boards. The term "laminated gypsum board", means a unit or assembly of units consisting of a gypsum board having attached to one or both faces thereof a layer or layers of gypsum board, insulation board, decorated paper simulating wood veneers or tile, or other material, but as used in the proviso to Paragraph 2 above shall not include gypsum board having a metallized surface.

14. If Licensor shall at any time during the existence of this agreement make or obtain any improvement for the formation of the bubbles or foam described in the process set forth in applications for United States Letters Patent as originally filed by Carlisle K. Roos, Serial No. 733197, 3477, and 142155, and by Erik C. Bayer, Serial No. 661723, or in Letters Patent Nos. 2017022, 2079338, and 2080009, or the method of its introduction into the core [fol. 746] of gypsum board, and which improvement is covered by the claims of the aforesaid applications and letters patent, and shall itself use the same in its own

manufacture, then so long as Licensee shall continue to pay the license fees or royalties hereinbefore stipulated, the right, license or privilege herein contained shall be extended to and include the use of said improvement in the manufacture by Licensee of gypsum board, subject to all of the terms and conditions herein contained, except only that Licensee shall not be required to pay any additional royalty or license fee therefor. It is further agreed that if a patent or patents shall be granted or issued for or upon said improvement, then all of the provisions of this agreement shall apply to the improvement set forth and claimed in any such patent or patents. Licensor will promptly notify Licensee of the general adoption by it of any such improvement in its own manufacture, together with such information as it may possess as to the use thereof in the manufacture of gypsum board.

15. The Licensor agrees at any time during the term hereof to extend to Licensee, upon its written request, an indivisible and non-exclusive license or privilege to use the process or processes set forth and claimed in said Letters Patent Nos. 2017022, 2079338, and 2080009, in the manufacture in Licensee's plants of any other gypsum product not specifically covered by this agreement, and in which product Licensor shall use the same in its own manufacture, and to sell the same, upon the payment to Licensor of —— per cent (——%) of Licensee's selling price of all of such other gypsum product or products (in the manufacture of which said process or processes are used), manufactured and sold by Licensee, upon the same terms as set forth herein and subject to all of the conditions hereof, in which event in the agreement for the same [fol. 747] there shall be substituted for the words "gypsum board" the name of such other product or products. An agreement containing all of said terms and conditions shall be reduced to writing and signed by both parties before the same shall become effective.

16. This Agreement shall be effective as of the —— day of ——, 1949.

In witness whereof the parties hereto have caused these presents to be signed in duplicate by their respective presidents, attested by their respective secretaries, and

their corporate seal to be hereunto affixed, the day and year first above written.

United States Gypsum Company, By —— ——, President.

Attest: —— ——, Secretary.

—— ——, President.

Attest: —— ——, Secretary.

[fol. 748] LICENSE AGREEMENT

This Agreement, made this —— day of ——, A. D. 1949, by and between United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as Licensor, and ——, a —— corporation, of ——, hereinafter referred to as Licensee,

Witnesseth:

That, whereas, Licensor is the owner of United States Letters Patent No. 1,938,354, relating to a perforated gypsum board particularly adapted for fire-resistant wall and ceiling construction and structures as covered by the claims of said patent; and

Whereas, Licensee desires an indivisible and non-exclusive license from Licensor herein, to manufacture, use and sell perforated gypsum board embodying the inventions and improvements set forth and claimed in said Letters Patent No. 1,938,354 upon the terms and conditions hereinafter set forth;

Now, therefore, in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto agree as follows, to-wit:

1. Licensor agrees to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license and privilege of manufacturing, at the plants or factories now or hereafter owned or operated by Licensee or any subsidiary, associated or affiliated company, perforated gypsum board embodying the inventions and improvements set forth and claimed in said Letters Patent No. 1,938,354, and of selling and using in the United States of America, and the territories and possessions thereof, said perforated gypsum board manufactured by Licensee

[fol. 749] are aforesaid, for the full term of said Letters Patent, including any reissue thereof.

2. Licensee agrees to pay to Licensor for the right and privilege granted under Paragraph 1 above a license fee or royalty, for all perforated gypsum board, embodying any of the inventions and improvements set forth and claimed in said Letters Patent, which is manufactured and sold by Licensee during the term hereof, at the rate of —— cents (——¢) per thousand square feet of surface area, provided that no license fee or royalty shall be payable on perforated gypsum board exported by Licensee to any foreign country.

3. The license herein granted shall be personal to the Licensee and shall not be sold, assigned or transferred, either voluntarily or by operation of law, without the written consent of Licensor; *Provided, however,* that the license may be assigned by Licensee to any company acquiring all of Licensee's gypsum and gypsum board business, and assets pertaining thereto, or all of the capital stock of Licensee, on condition that Licensee shall first obtain, and deliver to Licensor, such assignee's written agreement to assume all of the obligations of Licensee hereunder and agreeing to be bound by all of the terms and conditions hereof.

4. Licensee agrees to keep separate, full and accurate books of account and records showing the exact quantity of perforated gypsum board manufactured and sold by it under the right, license and privilege herein granted, and agrees that on or before the 20th day of each calendar month it will deliver to Licensor at its office in Chicago, Illinois, true written returns, verified under oath by an officer or other authorized agent of Licensee setting forth the quantity of all such perforated gypsum board manufactured by it, and sold during the preceding calendar month. Licensee also agrees to pay to Licensor at its [fol. 750] said office on or before the 20th day of each calendar month the hereinbefore stipulated royalties or license fees which may then be due under the terms of this agreement on account of all such perforated gypsum board manufactured by it, and sold during the preceding calendar month.

5. Licensor, or its duly authorized representative, shall have the right at all reasonable times to inspect the books of account and records of Licensee referred to in Paragraph 4 hereof, and to make copies thereof and memoranda therefrom, *provided, however,* that upon written request of Licensee, such examination shall be made by a certified public accountant agreed upon between the parties hereto, in which event the expense thereof shall be borne equally by the parties. If the parties fail to agree upon the certified public accountant to make such examination, then Licensor shall name three certified public accountants of good standing, not directly or indirectly employed by it or in any other manner connected with it, and if Licensee shall not accept any one of them, then Licensor shall have the right to make such examination itself.

6. Licensee agrees that all perforated gypsum board manufactured and sold by it under or embodying any of the claims of said Letters Patent shall be distinctly marked "Patent No. 1,938,354", and with the further words "Licensed under the above patent". Licensee further agrees to distinctly mark said perforated gypsum board with such other appropriate notice as Licensor shall specify from time to time.

7. In the event either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements to be kept or performed by it under the provisions hereof, then the other party may at its election serve upon the party in default written notice of intention to terminate this license and specifying the alleged default. If the party in default shall not cure the default [fol. 751] so specified within thirty (30) days thereafter, then the other party may, subject to the provisions of paragraph 8 below, cancel and terminate this agreement without any court action by serving upon the party in default written notice of its election so to do; provided, that neither party shall be relieved thereby from any liability accrued at the time of such termination.

8. If a party upon whom a default notice is served under Paragraph 7 above shall deny the specified defaults, in whole or in part, then the right of the other party to terminate this license by reason of the defaults alleged

shall be suspended, provided the party served shall (a) within the said thirty (30) day period provided in Paragraph 7 above cure any defaults which are not denied, and (b) submit to arbitration the question as to whether the specifically denied defaults in fact occurred. In the event the arbitrators find that one or more of the alleged defaults have occurred, then the party in default shall cure the same within thirty (30) days from the date of the finding of such arbitrators. If not cured within said period the party serving such default notice, in addition to and without limitation upon any other rights and remedies which it may have hereunder, may cancel and terminate this agreement without any court action by serving upon the party in default written notice of its election so to do; provided, that neither party shall be relieved thereby of any liability accrued at the time of such termination.

All arbitrations had under this Paragraph 8 shall be in accordance with the Rules then obtaining of the American Arbitration Association, excepting only that the time allowed for objecting to arbitrators, or indicating the order of preference for arbitrators, as submitted to the parties for such purpose by said Association or under its Rules, shall in no event be less than fifteen (15) days. The finding [fol. 752] or findings of the arbitrators shall be final and conclusive. In the event the arbitrators shall find any license fees or royalties, or other sums of money herein required to be paid by the Licensee to the Licensor, are due and owing, the arbitrators shall in their findings fix and determine the amount thereof, and Licensor shall have the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the Arbitrators in any court of competent jurisdiction.

9. In the event the Licensee at any time be adjudicated a bankrupt, then the license hereunder shall immediately be and become cancelled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination.

10. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any other or

further breach or breaches. Either party may specifically enforce this contract, or any of the terms, conditions and covenants thereof, by injunction or in such other manner as may be permitted by law.

11. Any notice required or permitted to be served by either party upon the other under the terms hereof, may be served by mailing the same to the other party, postage prepaid and registered, addressed to such other party at its last known principal office, and the deposit of such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder.

12. In case Licensor shall grant to any other person any license under the aforesaid Letters Patent for the manufacture, sale or use of perforated gypsum board embodying the claims or inventions claimed in said patent, or shall grant any right under any such license, upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same [fol. 753] terms or extend to it the same right granted to any such other person.

13. Nothing herein contained shall be construed as granting any right, license or privilege under any Letters Patent other than Letters Patent No. 1,938,354, and it is understood that the royalties provided herein are in addition to the royalties or license fees provided under any other license agreement which may now or hereafter exist between the parties.

14. This agreement shall be effective as of the —— day of ——, 1949.

In witness whereof the parties hereto have caused these presents to be signed in duplicate by their respective presidents, attested by their respective secretaries, and their corporate seals to be hereunto affixed, the day and year first above written.

United States Gypsum Company, By —— ——, President.

Attest: —— ——, Secretary.

—— ——, President.

Attest: —— ——, Secretary.

[fol. 754] LICENSE AGREEMENT

This Agreement made this —— day of ——, A. D. 1949, by and between United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as Licensor, and ——, a —— corporation, of ——, hereinafter referred to as Licensee,

Witnesseth:

That in consideration of the mutual covenants and agreements herein contained, the parties hereto agree as follows, to-wit:

1. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license, and privilege to make and use the machines and inventions set forth and claimed in United States Letters Patent No. 1946056 dated February 6, 1934, and expiring February 6, 1951, at the plants or factories now owned or operated by Licensee, or at any other plant or factory hereafter owned or operated and controlled by Licensee or any subsidiary, associated or affiliated company of Licensee, for the full term of said letters patent, including any reissue therefor.

2. Licensee agrees to pay to Licensor for the right and privilege granted under Paragraph 1 above a licensee fee or royalty of —— cents (——¢) per one thousand (1,000) square feet of gypsum board bundled with a machine constructed according to any one or more of the claims set forth or claimed in said letters patent, and sold by Licensee during the term hereof.

3. The license herein granted shall be personal to the Licensee and shall not be sold, assigned, or transferred, either voluntarily or by operation of law, without the writ-
[fol. 755] ten consent of Licensor, *provided, however*, that this license may be assigned by Licensee to any company acquiring all of Licensee's gypsum and gypsum board business, and assets pertaining thereto, or all of the capital stock of Licensee, on condition that Licensee shall first obtain, and deliver to Licensor, such assignee's written agreement to assume all of the obligations of Licensee here-

under, and agreeing to be bound by all of the terms and conditions hereof.

4. Licensee agrees to keep separate, full, and accurate books of account and records showing the exact quantity of all gypsum board bundled with a machine constructed according to any one or more of the claims set forth and claimed in said letters patent, and sold by Licensee, and agrees that on or before the 20th day of each calendar month it will deliver to Licensor at its office in Chicago, Illinois, true written returns verified under oath by an officer or other authorized agent of Licensee, setting forth the quantity of all such gypsum board bundled by it with a machine constructed according to any one or more of the claims set forth in said letters patent, and sold during the preceding calendar month. Licensee also agrees to pay to Licensor at its said office, on or before the 20th day of each calendar month, the hereinbefore stipulated royalty or license fee which may then be due under the terms of this agreement on account of said gypsum board bundled by it as aforesaid, and sold during the preceding calendar month.

5. Licensor, or its duly authorized representative, shall have the right at all reasonable times to inspect the books of account and records of Licensee referred to in Paragraph 4 hereof, and to make copies thereof and memoranda therefrom, provided that upon written request of Licensee such examination shall be made by a certified public accountant satisfactory to Licensor, in which event the expense of such examination shall be borne equally by [fol. 756] the parties.

6. Licensee agrees that all bundles of gypsum board bundled by it with a machine constructed according to any one or more of the claims set forth and claimed in said letters patent, shall be distinctly marked "Machine used in making this bundle covered by Patent No. 1,946,-056", and Licensee further agrees to distinctly mark said bundles with such other appropriate notice as Licensor shall specify from time to time.

7. In the event either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements herein agreed to be kept or performed by it,

then the other party may at its election serve upon the party in default written notice of intention to terminate this license, which notice shall specify the alleged default. If the party in default shall not cure the default so specified within thirty (30) days after such notice, then the other party may, subject to the provisions of Paragraph 8 below, cancel and terminate this agreement, without any court action, by serving upon the party in default written notice of its election so to do; provided, that neither party shall be relieved thereby from any liability accrued at the time of such termination.

8. If a party upon whom a default notice is served under Paragraph 7 above shall deny the specified defaults, in whole or in part, then the right of the other party to terminate this license by reason of the defaults alleged shall be suspended, provided the party served shall (a) within the said thirty (30) day period provided in Paragraph 7 above cure any defaults which are not denied, and (b) submit to arbitration the question as to whether the specifically denied defaults in fact occurred. In the event the arbitrators find that one or more of the alleged defaults have occurred, then the party in default shall cure the same within thirty (30) days from the date of the finding of such [fol. 757] arbitrators. If not cured within said period the party serving such default notice, in addition to and without limitation upon any other rights and remedies which it may have hereunder, may cancel and terminate this agreement, without any court action, by serving upon the party in default written notice of its election so to do; provided, that neither party shall be relieved thereby of any liability accrued at the time of such termination.

All arbitrations had under this Paragraph 8 shall be in accordance with the Rules then obtaining of the American Arbitration Association, excepting only that the time allowed for objecting to arbitrators or indicating the order of preference for arbitrators, as submitted to the parties for such purpose by said Association or under its Rules, shall in no event be less than fifteen (15) days. The finding or findings of the arbitrators shall be final and conclusive. In the event the arbitrators shall find that any license fees or royalties, or other sums of money herein

required to be paid by the Licensee to the Licensor, are due and owing, the arbitrators shall in their findings fix and determine the amount thereof, and Licensor shall have the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the arbitrators in any court of competent jurisdiction.

9. In the event the Licensee shall at any time be adjudicated a bankrupt, then the license hereunder shall immediately be and become cancelled and terminated, but the Licensor shall not thereby be prevented from collecting all license fees or royalties accrued hereunder at the time of such termination.

10. Nothing herein contained shall be construed as constituting a license for the manufacture, use or sale of gypsum board under any other patents or patent rights of [fol. 758] Licensor, or as extending the term of any such license heretofore or hereafter granted by any other agreement between the parties hereto, and the royalty provided herein is in addition to any royalties or license fees provided in any such other agreement.

11. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any other or further breach or breaches. Either party may specifically enforce this contract, or any of the terms, conditions and covenants thereof, by injunction or in such other manner as may be permitted by law.

12. Any notice required or permitted to be served by either party upon the other under the terms hereof, may be served by mailing the same to the other party, postage prepaid and registered, addressed to such party at its last known principal office, and the deposit of such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder.

13. In case Licensor shall grant to any other person a license under the aforesaid patent upon terms more favorable than those granted hereunder to this Licensee, then it will grant to the Licensee herein a license on the same terms granted to any other such person.

14. The term "gypsum board" shall be understood to mean all board made of gypsum, by whatever name called,

having the characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths and all other gypsum boards.

15. This agreement shall be effective as of the —— day of ——, 1949.

In witness whereof the parties hereto have caused these presents to be signed by their respective presidents, attested by their respective secretaries, and their corporate [fol. 759] seals to be hereunto affixed in duplicate the day and year first above written.

United States Gypsum Company, By —— ——, President.

Attest: —— ——, Secretary.

By —— ——, President.

Attest: —— ——, Secretary.

[fol. 760] LICENSE AGREEMENT

This Agreement, made this —— day of ——, A. D. 1949, by and between United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as Licensor, and ——, a —— corporation, of ——, hereinafter referred to as Licensee,

Witnesseth:

That, whereas, Licensor is the owner of United States Letters Patent No. 1,914,345 relating to wall construction (hereinafter referred to as the Roos Patent), and is also the owner of certain patent rights set forth in Schedule A hereunto annexed, relating to building structures or elements for said structures; and

Whereas, Licensee desires an indivisible and non-exclusive license from Licensor herein, to manufacture, use and sell gypsum board under said Roos Patent and under said patent rights set forth in Schedule A hereof, and Licensor has agreed to grant such license upon the terms and conditions, but subject to the limitations hereinafter stated;

Now, therefore, in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto agree as follows, to-wit:

1. Licensor agrees to and does hereby give and grant unto Licensee the indivisible and non-exclusive right, license, and privilege to make, use, and sell gypsum board having a metallized surface, embodying the inventions disclosed and claimed in said Roos Patent and in the patents set forth in Schedule A, or in any of them, Provided, that the right, license, and privilege herein and [fol. 761] hereby granted is specifically limited to the gypsum board and building structures incorporating the same as set forth in Schedule A, and does not extend to any other product or structure.

2. Licensee agrees to pay to Licensor for the right and privilege granted under Paragraph 1 above, a royalty for all gypsum board having a metallized surface manufactured and sold by Licensee and which is covered by the claims of said Roos Patent or the patents set forth in Schedule A, or which is to be used in making structures covered by said patent or patent rights, at the rate of —— cents (——¢) per thousand square feet of surface area where only one face is metallized, and at the rate of —— cents (——¢) per thousand square feet where both faces are metallized, of any product covered by the aforesaid patent or any of said patent rights.

3. The license herein granted is personal to the Licensee and shall not be sold, assigned or transferred, either voluntarily or by operation of law, without the written consent of Licensor; Provided, however, that the license may be assigned by Licensee to any company acquiring all of Licensee's gypsum and gypsum board business, and assets pertaining thereto, on condition that Licensee shall first obtain, and deliver to Licensor, such assignee's written agreement to assume all of the obligations of Licensee hereunder and agreeing to be bound by all of the terms and conditions hereof.

4. In case Licensor shall grant to any other person any license under the aforesaid patent or patent rights for the manufacture, sale or use of gypsum board having a metallized surface and embodying the claims or inven-

tions set forth and claimed therein, upon terms more favorable than those granted hereunder to Licensee, then Licensor shall grant to Licensee a license upon the same terms, or will extend to Licensee the same right granted [fol. 762] to such other licensee.

5. Licensee agrees to keep true and accurate books of account showing the quantity of all gypsum board having one or more metallized surfaces, manufactured and sold by it under the rights, licenses, and privileges herein granted. Such books and records shall at all times during business hours be open to the inspection of Licensor or its duly authorized representative, and Licensor shall have the right to make copies thereof and memoranda therefrom, provided that upon written request of Licensee such examination shall be made by a certified public accountant satisfactory to Licensor, in which event the expense thereof shall be borne equally by the parties.

6. Licensee agrees that on or before the 15th day of each calendar month it will deliver to Licensor at its office in Chicago, Illinois, a written report, verified by an officer or other authorized agent of Licensee, showing the quantity of all such gypsum board manufactured by it (a) having one metallized surface, and (b) having two metallized surfaces, and sold during the preceding calendar month. Licensee also agrees to pay to Licensor at its said office on or before the 15th day of each calendar month the hereinbefore stipulated royalty which may then be due under the terms of this agreement on account of all such gypsum board so sold by Licensee during the preceding calendar month. For the purposes of this agreement a sale shall be considered to have been made not later than the date on which the goods are shipped by Licensee, without regard to passing of title or whether the goods are shipped on consignment, or otherwise.

[fol. 763] 7. Licensee agrees that all gypsum board having one or more metallized surfaces sold by it hereunder shall be distinctly marked with the word "Patent" followed by the number of any of the aforesaid patents, the claims of which are embodied in said gypsum board, and with the words "Wall structures having hollow spaces faced by said metallized surfaces, also covered by Patent

No. 1,914,345"; and also with the words "Licensed under the above patents". Licensee further agrees to distinctly mark said gypsum board with such other appropriate notice as Licensor shall specify from time to time.

8. In the event Licensee shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements to be kept or performed by it under the provisions hereof, then Licensor may at its election serve upon Licensee written notice specifying the alleged default and stating, if Licensor so desires, its intention to terminate this license. If Licensee shall not cure the default so specified within thirty (30) days thereafter, then Licensor may, subject to the provisions of Paragraph 9 below, maintain any appropriate action hereunder, at law or in equity, for collection of royalties, or for damages, or for any other appropriate remedy, or Licensor may, if such intention was stated in the notice of default, cancel and terminate this agreement without any court action, by serving upon Licensee written notice of its election so to do; provided, that Licensee shall not be relieved thereby from any liability accrued at the time of such termination.

9. If Licensee shall deny, in whole or in part, the defaults specified in a notice served by Licensor under Paragraph 8 above, then Licensor's right to proceed as pro- [fol. 764] vided in Paragraph 8 above shall be suspended, provided Licensee shall (a) within the said thirty (30) day period provided in Paragraph 8 above cure any defaults which are not denied, and (b) submit to arbitration the question as to whether the specifically denied defaults in fact occurred. In the event the arbitrators find that one or more of the alleged defaults have occurred, then Licensee shall cure the same within thirty (30) days from the date of the finding of such arbitrators. If not cured within said period then Licensor may proceed in such manner as it may elect as provided in Paragraph 8 above.

All arbitrations had under this Paragraph 9 shall be in accordance with the Rules then obtaining of the American Arbitration Association, excepting only that the time allowed for objecting to arbitrators, or the order of preference for arbitrators, as submitted to the parties for such purpose by said Association or under its Rules, shall

in no event be less than fifteen (15) days. The finding or findings of the arbitrators shall be final and conclusive. In the event the arbitrators shall find any royalties, or other sums of money herein required to be paid by the Licensee to the Licensor, are due and owing, the arbitrators shall in their findings fix and determine the amount thereof, and Licensor shall have the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the arbitrators in any court of competent jurisdiction.

10. In the event (a) that Licensee shall be adjudicated a bankrupt, or (b) a receiver shall be appointed for Licensee, whose appointment shall not be vacated within sixty (60) [fol. 765] days thereafter, then the rights, licenses, and privileges herein granted to Licensee shall forthwith cease and determine, without further action on the part of the Licensor, provided that such termination shall not relieve Licensee of any liability then existing.

11. The waiver by Licensor of any breach on the part of Licensee shall not be interpreted as constituting a waiver of any further or other breach or breaches.

12. Any notice required or permitted to be served by either party upon the other under the terms hereof, may be served by mailing the same to the other party, postage prepaid and registered, addressed to such party at its last known principal office, and the deposit of such notice in the United States mails, registered, postage prepaid and so addressed, shall constitute service of notice hereunder.

13. The term "gypsum board" shall be understood to mean all board made of gypsum, by whatever name called, having the characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths, laminated gypsum board, and all other gypsum boards.

14. Except as otherwise provided herein, this agreement shall remain in force for the full term of the last to expire of the Roos Patent and the patent rights set forth in Schedule A, and shall be binding upon and inure to the benefit of the parties hereto and their successors and

assigns; provided that nothing in this paragraph contained shall be construed to permit any assignment hereof except as herein otherwise specifically provided. Nothing herein contained shall be construed to relieve Licensee from the payment of royalties under license agreement of even [fol. 766] date herewith under Letters Patent Nos. 2017022, 2079338, 2080009, and 1938354, it being understood that the royalties provided herein are in addition to the royalties or license fees provided in such other agreement. In the event the exclusive right and license of Licensor as set forth in Schedule A hereof shall terminate for any reason whatever, whether on account of Licensor's default or otherwise, and such termination shall result in the termination of any of the rights, licenses and privileges herein granted to the Licensee, then this agreement shall immediately terminate without further act on the part of either of the parties hereto (subject however to revival and continuation as hereinafter provided), and without liability of any kind by Licensor to Licensee on account thereof, provided that Licensee shall not thereby be released from any then existing liability to Licensor. Licensor agrees that if its said exclusive right and license shall be so terminated, it will promptly notify Licensee thereof and, if Licensee's rights shall have terminated as aforesaid, then upon the written request of Licensee made to Licensor at any time within sixty (60) days after the giving of such notice, this license agreement shall continue in effect as to said Roos Patent, upon and subject to all the terms, provisions, and conditions hereof to the extent the same are applicable; provided however, that in such event it is expressly understood and agreed that Licensor shall not be liable to Licensee in any way, directly or indirectly, for or by reason of any infringement or claimed infringement of the patents listed in Schedule A hereof.

[fol. 767] 15. Licensor hereby represents and warrants that it has the right to grant the license herein granted.

16. This agreement shall be effective as of the —— day of ——, 1949.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents,

attested by their respective Secretaries, and their corporate seals to be hereunto affixed, in duplicate, the day and year first above written.

United States Gypsum Company, By —— ——, President.

Attest: —— ——, Secretary.

By —— ——, President.

Attest: —— ——, Secretary.

[fol. 768] Schedule A

Licensor has the exclusive right and license to make, use and sell building structures or elements for building structures where insulation is obtained by the use of gypsum board having a metallized surface under the following patents, known as the Alfol patents:

Inventor	*Patent No.*	*Issue Date*
Schmidt	1,890,418	December 6, 1932
Dykerhoff	1,934,174	November 7, 1933
Schmidt	2,015,817	October 1, 1935

together with any divisions, continuations, renewals or reissues thereof, but it is understood that the term "building structures" is limited to the walls, floors, roofs and ceilings of buildings and does not include pipes or ducts, or other heating apparatus installed in the building, or refrigerating or cooling apparatus or structures whether built into the building or not. Licensor has no right or license under the said patents to use metal foil for insulation except where such foil is applied to a non-metallic member as a facing therefor.

[fol. 769] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PETITION FOR APPEAL BY U.S. GYPSUM CO., ET AL.—
Filed January 6, 1950

Considering themselves aggrieved by the final decree and judgment of this court entered on November 7, 1949, United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, defendants herein, do hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said defendants, and that the material parts of the record, proceedings and papers upon which said final judgment and decree was based duly authenticated be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Respectfully submitted,

Albert R. Connelly, Cranston Spray, Hugh Lynch, Jr., Attorneys for defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode.

[fol. 770] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

ORDER ALLOWING APPEAL OF U.S. GYPSUM CO., ET AL.,
FROM JUDGMENT AND DECREE OF NOVEMBER 7, 1949—
January 6, 1950

United States Gypsum Company, Sewell L. Avery and Oliver M. Knode having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this court in this cause entered on November 7, 1949, and from each

and every part thereof, and having presented their assignment of errors and prayer for reversal and their statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $250.00, with good and sufficient surety, and shall be conditioned as may be required by law.

[fol. 771] It is further ordered that citation shall issue in accordance with law.

Harold M. Stephens, Finis J. Garrett, Joseph R. Jackson, Designated as Justices of the District Court of the United States for the District of Columbia.

Dated this 6th day of January, 1950.

[fol. 772] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ASSIGNMENT OF ERRORS BY U.S. GYPSUM CO., ET AL., AND PRAYER FOR REVERSAL—Filed January 6, 1950

United States Gypsum Company, Sewell L. Avery and Oliver M. Knode, defendants in the above entitled cause, complain that the United States District Court for the District of Columbia, committed manifest error to the prejudice of said defendants in the above entitled cause and assign the following errors in the record and proceedings herein upon which they will rely on their appeal to the Supreme Court of the United States (each numbered paragraph being a separate assignment of error):

1. The court erred in determining that there was not any genuine issue between the plaintiff and the defendants as to any material fact.

2. The court erred in sustaining plaintiff's motion for summary judgment.

3. The court erred in entering herein its final judgment and decree of November 7, 1949.

[fol. 773] 4. The court erred in determining that its said judgment and decree of November 7, 1949 is "in conformity with the decision of the Supreme Court" heretofore rendered herein (333 U. S. 364).

5. The court erred in determining that its said judgment and decree of November 7, 1949 is "in obedience to" the mandate of the Supreme Court dated April 9, 1948.

6. The court erred in holding by its said judgment and decree of November 7, 1949 that the patent licenses enumerated in Article II of said judgment and decree of November 7, 1949 are unlawful under the antitrust laws of the United States and illegal, null and void.

7. The court erred in holding by its said judgment and decree of November 7, 1949 that the defendant companies had acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board, or had monopolized trade and commerce in the gypsum board industry in violation of sections 1 and 2 of the Sherman Antitrust Act.

8. The court erred by its said judgment and decree of November 7, 1949 in enjoining and restraining each of the defendant companies, and each of their respective officers, directors, agents, employees, representatives, subsidiaries, and any person acting or claiming to act under, through, or for them, or any of them, from (1) the further performance or enforcement of any of the provisions of said patent licenses, including any price bulletin issued [fol. 774] thereunder, or (2) entering into or performing any agreement or understanding among the defendants, or any of them, for the purpose of or with the effect of continuing, reviving or reinstating any monopolistic practice, or (3) entering into or performing any agreement or understanding among the defendants, or any of them, in restraint of trade and commerce in gypsum board among the several states in the eastern territory of the United States by license agreements to fix, maintain or stabilize

prices of gypsum board or the terms and conditions of sale thereof.

9. The court erred by its said judgment and decree of November 7, 1949 in requiring United States Gypsum Company to grant to each applicant therefor, within ninety days after the effective date of said judgment and decree a nonexclusive or other license (whether in the form approved by the court or otherwise) to make, use, or vend under any, some, or all patents or patent applications now owned or controlled by said United States Gypsum Company relating to gypsum board or in providing that such license agreement fix a royalty not to exceed the royalty on the same article or process fixed in the license agreements set out in Article II of said judgment and decree.

10. The court erred by its said judgment and decree of November 7, 1949 in enjoining and restraining said United States Gypsum Company from making any sale or other disposition of any of said patents or patent applications which would deprive it of the power or authority to grant [fol. 775] such licenses unless in any sale, transfer or assignment it should be required that the purchaser, transferee, or assignee shall observe the provisions of said Article VI of said judgment and decree of November 7, 1949.

11. The court erred in directing in Article IX of said judgment and decree of November 7, 1949 that jurisdiction of the cause and of the parties be retained by the court for the purpose of enabling any of the parties to said judgment and decree, or any other person, firm, or corporation that may thereafter become bound thereby, in whole or in part, to apply to the court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of said judgment and decree, or (2) for the enforcement of compliance therewith.

12. The court erred in entering its said judgment and decree of November 7, 1949 against the defendant companies, or any of them, for any part of the costs to be taxed in said proceeding.

13. The court erred in denying to defendants, and to each of them, the right to introduce evidence on the issues

raised by the pleadings herein following the remand of the cause.

14. The court erred in that, by denying to defendants, and to each of them, the right to introduce evidence on the issues herein, the court deprived the defendants of the due process of law in violation of the Constitution of the United States, and particularly Article V thereof. [fol. 776] 15. The court erred by denying to defendants, and to each of them, the right to introduce evidence on the issues herein, in violation of the provisions of Rule 41(b) of the Federal Rules of Civil Procedure.

16. The court erred in its construction of the opinion of the Supreme Court herein (333 U. S. 364), and in its construction of the mandate of the Supreme Court herein dated April 9, 1948, in so far as the court held that the granting of plaintiff's motion for summary judgment was required by said opinion and mandate.

Wherefore, said United States Gypsum Company, Sewell L. Avery and Oliver M. Knode pray that said final judgment and decree of November 7, 1949 may be reversed in all respects, and that the case be remanded to the District Court with specific direction that the court proceed with the hearing of the issues in the case and the introduction of evidence on behalf of the defendants and of the plaintiff, and that such other and further relief may be granted as the court may deem just and proper.

Respectfully submitted,

Albert R. Connelly, Cranston Spray, Hugh Lynch, Jr., Attorneys for defendants United States Gypsum Company, Sewell L. Avery and Oliver M. Knode.

[fol. 777] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ORDER ALLOWING APPEAL OF UNITED STATES—

January 6, 1950

In the above-entitled cause the United States of America plaintiff, having made and filed its petition praying an appeal to the Supreme Court of the United States from the final judgment and decree of this Court in this cause entered on the 7th day of November, 1949, and having also made and filed its Assignment of Errors and Prayer for Reversal, and Statement of Jurisdiction, and having in all respects conformed to the statutes and rules in such cases made and provided.

It is therefore ordered and adjudged

That the appeal be and the same is hereby allowed as prayed for.

Harold M. Stephens, Finis J. Garrett, Joseph R. Jackson, Designated as Judges of the United States District Court for the District of Columbia.

This 6th day of January, 1950.

[fol. 778] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

ASSIGNMENT OF ERRORS BY UNITED STATES AND PRAYER FOR REVERSAL—Filed January 6, 1950

The United States of America, plaintiff in the above-entitled cause, in connection with its petition for appeal

to the Supreme Court of the United States, hereby assigns error to the record and proceedings and the entry of the final decree in the district court on November 7, 1949, in the above-entitled cause, and says that in the entry of the final decree the district court committed error to the prejudice of the plaintiff in the following particulars:

1. The court erred in failing to adjudicate that each individual defendant has violated Sections 1 and 2 of the Sherman Act, and in not subjecting each such defendant to the injunctive provisions of the judgment.

2. The court erred in failing to adjudicate that the defendants have conspired to restrain interstate commerce in gypsum products, in violation of Section 1 of the Sherman Act.

3. The court erred in limiting the prohibitions of Article V (3) of the judgment to restraints of trade involving only [fol. 779] gypsum board and in limiting these prohibitions to restraints of trade effected only by "license agreements."

4. The court erred in not enjoining any two or more defendants from agreeing, combining or conspiring with each other to eliminate price competition in the sale of gypsum board or gypsum products, to stabilize the prices thereof, to suppress any class of distributor thereof, or to suppress the production of unpatented gypsum products.

5. The court erred in limiting the requirement imposed upon United States Gypsum Company by Article VI, paragraph 1, of its judgment to 90 days after the effective date thereof, and in limiting such requirement to the nine patents referred to in the forms of agreement which the court approved and ordered filed herein (Decree, Article VIII).

6. The court erred in not providing that each license granted pursuant to the requirements of Article VI, paragraph 1, of the judgment shall be at a reasonable royalty, to be determined, in the event of disagreement, by the court or by a neutral third party.

7. The court erred in providing (Decree, Article VIII) that tender by United States Gypsum Company of a license containing the terms and conditions set forth in the

applicable form of agreement which the court "approved" and "ordered filed herein" shall constitute compliance by United States Gypsum Company with the provisions of Article VI of the judgment.

8. The court erred in providing in the first of the license forms which it approved that the licensee shall make a monthly report to United States Gypsum Company of the "quantity" of all gypsum board manufactured by it under the licensed patents, together with the "selling price" thereof, and that United States Gypsum Company may [fol. 780] inspect the books and records of the licensee and make copies thereof (subject to the proviso that, upon the licensees' request, such examination shall be made by a certified public accountant).

9. The court erred in not entering judgment against the defendants for the full taxable costs of the proceeding.

10. The court erred in not including in its judgment provisions corresponding to those of Sections V, VI, IX and XI of the decree proposed by the plaintiff.

11. The court, if it concluded that controverted questions of fact prevented entry of judgment on the whole case or for all the relief requested, erred in not entering an order specifying the facts which it ascertained to be in dispute and directing the trial to proceed as to those facts.

Wherefore, plaintiff prays that the final decree of the district court may be reversed to the extent that it is inconsistent with the errors herein assigned by the plaintiff, and for such other and fit relief as the court may deem just and proper.

Herbert A. Bergson, Assistant Attorney General;
Edward Knuff, Special Assistant to the Attorney General.

January 6, 1950.

[fol. 781] IN UNITED STATES DISTRICT COURT

MANDATE OF SUPREME COURT OF THE UNITED STATES ENTERED ON JULY 18, 1950 AND FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA ON JULY 19, 1950

UNITED STATES OF AMERICA, ss:

The President of the United States of America,

To the Honorable the Judges of the United States District Court for the District of Columbia, —— ——

Greeting:

Whereas, lately in the United States District Court for the —— District of Columbia, —— before you, or some of you, in a cause between The United States of America, Plaintiff, and United States Gypsum Company et al., Defendants, Civil Action No. 8017, wherein the decree of the said District Court on the remand from the Supreme Court of the United States was duly entered in said cause on the [fol. 782] 7th day of November, A. D. 1949; as by the inspection of the transcript of the record —— —— of the said District —— Court, which was brought into the Supreme Court of the United States by virtue of an appeal sued out by United States Gypsum Company, Sewell L. Avery, et al., —— agreeably to the act of Congress, —— —— in such case made and provided, fully and at large appears. [fol. 783] And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and forty-nine ——, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was duly submitted:

On consideration whereof, It is now here ordered —— —— by this Court that the appeal of United States Gypsum Company et al., in this cause be, and the same is hereby, dismissed.

May 29, 1950.

[fol. 784] You, therefore are hereby commanded that such proceedings be had in said cause, —— —— as ac-

cording to right and justice, and the laws of the United States, ought to be had, the said appeal —— notwithstanding.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, the eighteenth —— day of July ——, in the year of our Lord one thousand nine hundred and fifty.

Charles Elmore Cropley, Clerk of the Supreme Court of the United States.

[fol. 785] IN UNITED STATES DISTRICT COURT

MANDATE OF THE SUPREME COURT OF THE UNITED STATES ENTERED JANUARY 3, 1951 AND FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA ON JANUARY 4, 1951

UNITED STATES OF AMERICA, ss:

The President of the United States of America,

To the Honorable the Judges of the United States District Court for the District of Columbia.
Greeting:

Whereas, lately in the United States District Court for the —— District of Columbia, —— —— before you, or some of you, in a cause between The United States of America, Plaintiff, and United States Gypsum Company; National Gypsum Company; Certain-Teed Products Corporation et al., defendants, Civil Action No. 8017, wherein the decree of the said District Court on the remand from the Supreme Court of the United States was duly entered in said cause on the 7th day of November, A. D. 1949, which decree is fully set out in the record of said cause in the office of the Clerk of said District Court and is incorporated herein by ref-
[fol. 786] erence thereto; as by the inspection of the transcript of the record —— —— of the said District —— Court, which was brought into the Supreme Court of the

United States by virtue of an appeal —— —— allowed on the petition of the United States of America, agreeably to the act of Congress, —— —— in such case made and provided, fully and at large appears.

[fol. 787] And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and fifty ——, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is ordered, —— adjudged, and decreed —— by this Court that the decree —— of the said District —— Court, in this cause be, and the same is hereby, reversed.

It is further ordered that this cause, be, and it is hereby, remanded to the District Court for further proceedings in conformity with the opinion of this Court.

It is further ordered that the injunction entered on May 29, 1950, pending further order of this Court, be, and it is continued in effect until the entry of a final decree in the District Court.

November 27, 1950.

[fol. 787a] You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this Court, —— as according to right and justice, and the laws of the United States, ought to be had, the said appeal —— —— notwithstanding.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, the third —— day of January ——, in the year of our Lord one thousand nine hundred and fifty-one.

Charles Elmore Cropley, Clerk of the Supreme Court of the United States, By Hugh W. Barr, Deputy.

[fol. 788] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PLAINTIFF'S PROPOSED FINAL JUDGMENT—Filed March 6, 1951

Articles I to X, inclusive, of the judgment of this Court dated November 7, 1949, are hereby set aside and vacated, and in lieu thereof

It is ordered, adjudged and decreed:

Article I

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states a cause of action against defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Antitrust Act, and acts amendatory thereof and supplemental thereto.

[fol. 789]

Article II

For the purposes of this judgment:

1. "Defendant companies shall mean all of the corporate defendants and Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company.
2. "Patents" shall mean United States Letters Patent and applications for United States Letters Patent relating to gypsum board, its processes, methods of manufacture, or use, and continuations in whole or in part, renewals, reissues, divisions, and extensions of any such patent or patent application.
3. "Gypsum board" shall mean plasterboard, lath, wallboard, special surfaced board, sheathing, liner board (including any such product which is perforated or metallized) made from gypsum.
4. "Gypsum products" shall mean gypsum board as defined in the preceding paragraph, and plaster, block, tile and Keene's cement made from gypsum.

5. As used in Article IV, "license agreements" shall mean the patent license agreements which were in effect between defendant United States Gypsum Company and each of the other defendant companies at the time the complaint herein was filed and described in said complaint as follows:

Agreement dated October 15, 1929, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee;

Agreement dated October 17, 1929, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee;

Agreement dated October 18, 1929, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee;

Agreement dated November 5, 1929, between United States Gypsum Company, as licensor, and Universal Gypsum and Lime Company (National Gypsum Company, as Assignee), as licensee;

Agreement dated November 25, 1929, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee;

[fol. 790] Agreement dated April 23, 1930, between United States Gypsum Company as licensor, and Kelley Plasterboard Company (Newark Plaster Co. as Assignee), licensee;

Agreement dated February 10, 1937, between United States Gypsum Company, as licensor, and Texas Cement Plaster Company, as licensee;

Agreement dated October 5, 1934, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee (Metallized board);

Agreement dated October 12, 1934, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Metallized board);

Agreement dated November 2, 1934, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Metallized board);

Agreement dated December 4, 1934, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee (Metallized board);

Agreement dated August 14, 1935, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Metallized board);

Agreement dated June 8, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

Agreement dated February 2, 1937, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated June 23, 1937, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Perforated lath);

Agreement dated January 3, 1939, between United States Gypsum Company, as licensor, and Newark Plaster Company, as licensee (Perforated lath), and any supplement or amendment to any of said patent license agreements.

Article III

The defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopo- [fol. 791] lized trade and commerce in the gypsum board industry in violation of Sections 1 and 2 of the Sherman Antitrust Act.

Article IV

Each of the license agreements listed in Article II hereof is adjudged unlawful under the antitrust laws of the United States and illegal, null and void.

Article V

The defendant companies, and their respective officers, directors, agents, employees, representatives, and subsidiaries, be and each of them hereby is enjoined from entering into or performing any agreement or understanding to fix, maintain, stabilize, or make uniform, by patent license agreements or by other concerted action, the prices, or the terms or conditions of sale of, gypsum products sold or offered for sale or resale in or affecting interstate commerce; and from engaging in, pursuant to such an agreement or understanding, any of the following acts or practices:

1. The further performance or enforcement of any of the provisions of the license agreements adjudged unlawful in Article IV hereof, including the provisions of any price bulletin issued thereunder;
2. Agreeing upon or adhering to any basis for the selection or classification of purchases of gypsum products;
3. Refraining from selling gypsum products to any purchaser or any class of purchasers;
4. Agreeing upon any plan of selling or quoting gypsum products at prices calculated or determined pursuant to a delivered price plan which results in identical prices or price quotations at given points of sales or quotation by defendants using such plan;
5. Policing, investigating, checking or inquiring into the prices, quantities, terms or conditions of any offer to sell or sale of gypsum products.

[fol. 792]

Article VI

1. Defendant United States Gypsum Company is hereby ordered and directed to grant to each applicant therefor, but only in so far as it has the right to do so, a non-exclusive license to make, use and vend under any, some or all of the

patents now or hereafter owned or controlled by it; and is hereby enjoined from making any sale or other disposition of any of said patents which deprives it of the power or authority to grant such licenses, unless it requires, as a condition of such sale, transfer or assignment, that the purchaser, transferee or assignee shall observe the requirements of Articles VI and VIII of this judgment and unless the purchaser, transferee or assignee shall file with this Court, prior to consummation of said transaction, an undertaking to be bound by said articles of this judgment.

2. Defendant United States Gypsum Company is hereby enjoined from including any restriction or condition whatsoever in any license or sublicense granted by it pursuant to the provisions of this article except that (a) the license may be nontransferable; (b) a reasonable non-discriminatory royalty may be charged, which royalty may not be imposed upon or measured by patent-free products, processes or uses; (c) reasonable provisions may be made for periodic inspection of the books and records of the licensee by an independent auditor or any person acceptable to the licensee, who shall report to the licensor only the amount of the royalty due and payable; (d) reasonable provision may be made for cancellation of the license upon failure of the licensee to pay the royalty or to permit the inspection of its books and records as hereinabove provided; (e) the license must provide that the licensee may cancel the license at any time after one year from the initial date thereof by giving 30 days' notice in writing to the licensor.

3. Upon receipt of written request for a license under the provisions of this article, defendant United States Gypsum Company shall advise the applicant in writing of the royalty which it deems reasonable for the patent or [fol. 793] patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within 60 days from the date such request for a license was received by United States Gypsum Company, the applicant therefor may forthwith apply to this Court for the determination of a reasonable royalty, and the United States Gypsum Company shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General, who shall have the right to be

heard thereon. The reasonable royalty rates, if any, determined by the Court shall apply to the applicant and all other licensees under the same patent or patents. Pending the completion of any such proceeding the applicant shall have the right to make, use and vend under the patents to which his application pertains without payment of royalty or other compensation except as provided in paragraph 4 of this article.

4. Where an application has been made to this Court for the determination of a reasonable royalty under paragraph 3 of this article, United States Gypsum Company may apply to the Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If the Court fixes such interim royalty rate, United States Gypsum Company shall then issue and the applicant shall accept a license, or, as the case may be, a sublicense, providing for the periodic payment of royalties at such interim rate from the date of the filing of such application by the applicant. If the applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such action shall be grounds for the dismissal of his application. Where an interim license or sublicense has been issued pursuant to this paragraph, reasonable royalty rates, if any, as finally determined by the Court shall be retroactive for the applicant and for all other licensees under the same patent or patents whose licenses provide for a higher royalty rate to a date to be fixed by the Court.

[fol. 794] 5. At any time after five years from the effective date of this judgment defendant United States Gypsum Company may apply to this Court, after notice to the Attorney General, for an order limiting the application of paragraph 1 of this Article to patents coming under the ownership or control of the United States Gypsum Company prior to the date of such application; and the Court, upon a showing by United States Gypsum Company that the effects of defendants' combination have been dissipated and that competitive conditions in the gypsum board industry have been restored, shall grant said application and enter an order modifying paragraph 1 of Article VI of this judgment.

Article VII

Nothing contained in this judgment shall be deemed to have any effect upon the operations or activities of the defendants which are authorized or permitted by the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or the Act of Congress of August 17, 1937, commonly called the Miller-Tydings Act, or by any present or future act of Congress or amendment thereto; provided, however, nothing contained in this article shall in any manner affect the provisions of Article VI of this judgment.

Article VIII

For the purpose of securing compliance with this judgment, authorized representatives of the Department of Justice, upon written request of the Attorney General or an Assistant Attorney General to any defendant company and upon reasonable notice, shall be permitted, subject to any legally recognized privilege, access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this judgment. Any authorized representative of the Department of Justice shall be permitted to interview officers or employees of any [fol. 795] defendant company regarding any such matters, subject to the reasonable convenience of said defendant but without restraint or interference from it; provided, however, that such officer or employee may have counsel present. No information obtained by the means provided in this article shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this judgment or as otherwise required by law.

Article IX

Judgment is entered against the defendant companies for 50% of all costs to be taxed in this proceeding, which 50% amounts to $1412.00; and the costs so to be taxed are

hereby prorated against the several defendant companies as follows:

United States Gypsum Company	$776.60
National Gypsum Company	324.76
Certain-teed Products Corporation	155.32
The Cellotex Corporation	42.36
Ebsary Gypsum Company, Inc.	42.36
Newark Plaster Company	56.48
Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company	14.12

Article X

Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this judgment, or any other person, firm or corporation that may hereafter become bound thereby in whole or in part, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or [fol. 796] carrying out of this judgment, and (2) for the enforcement of compliance therewith and the punishment of violations thereof.

By —— ——.

Dated —— ——, 1951.

I hereby certify that the within is a true and correct copy of plaintiff's proposed final judgment as filed with the district court on March 6, 1951.
Dated October 19, 1955.

Edward Knuff, Attorney for United States of America; Hugh Lynch, Jr., Attorney for U. S. Gypsum Co.

[fol. 797] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM Company; Certain-Teed Products Corporation; The Celotex Corporation; Ebsary Gypsum Company, Inc.; Newark Plaster Company; Samuel M. Gloyd, Doing Business Under The Name of Texas Cement Plaster Company; Sewell L. Avery; Oliver M. Knode; Melvin H. Baker; Frederick G. Ebsary; and Frederick Tomkins, Defendants

PRELIMINARY STATEMENT AND SUGGESTED FORM OF REVISED DECREE—BY U.S. GYPSUM CO.—Filed March 6, 1951

This cause came on for trial before this Court on November 15, 1943. At the conclusion of plaintiff's presentation of the case, defendants moved, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, for judgment dismissing the complaint on its merits. The motion of defendants was granted August 6, 1946. The judgment so rendered by this Court was reversed by the Supreme Court of the United States, and the case was remanded to this Court for further proceedings in conformity with the opinion of the Supreme Court (333 U. S. 364).

Following the remand, the plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, moved for summary judgment in its favor upon the pleadings and all of the proceedings which theretofore had been had in the case, or, in the alternative, for such further proceedings [fol. 798] as this Court might direct, and defendants, by direction of the Court, filed proffers of proof.

Argument by counsel for the respective parties upon the motion of plaintiff was heard by the Court, and after due consideration of such argument and of defendants' proffers of proof, Garrett, J. and Jackson, J., constituting a majority of the Court, announced a ruling to the effect

that plaintiff's motion for summary judgment would be granted, and Stephens, J., who presided during the trial, announced his dissent from such ruling.

Thereafter counsel for plaintiff and counsel for certain of the defendants submitted forms of final decrees for the consideration of the Court and also suggested findings of fact, the latter to be considered in the event the Court should deem it necessary to make any findings of fact additional to those originally found by it and to those stated in the opinion of the Supreme Court.

In due course, the Court heard arguments respecting the proposed decrees and the suggested findings of fact, and full consideration was given thereto and to all prior proceedings—all being considered in the light of the decision of the Supreme Court which, as understood by the majority of this Court, held that the defendants acted in concert to restrain trade and commerce in the gypsum board industry and monopolized said trade and commerce among the several states in that section hereinafter referred to as the eastern territory of the United States, which section embraces all the states of the United States westward from the eastern coast thereof to the Rocky Mountains and including New Mexico, Colorado, Wyoming, and the eastern half of Montana.

[fol. 799] Thereafter this Court, on November 7, 1949, entered its decree sustaining plaintiff's motion for summary judgment and granting relief which it deemed appropriate to its adjudication. Plaintiff thereupon appealed to the Supreme Court seeking to have the scope of the relief enlarged, and certain defendants appealed to the Supreme Court for a reversal of the judgment, which latter appeal was dismissed by the Supreme Court on May 29, 1950. On November 27, 1950, the Supreme Court rendered an opinion on the plaintiff's appeal, affirming this Court's adjudication of Sherman Act violation, holding there was concerted action through the fixed-price licenses and accepting as true the underlying facts in the defendants' proof by proffer. Nevertheless, the Supreme Court reversed the decree heretofore entered herein and remanded the cause to this Court with instructions to

modify its decree and for further proceedings in conformity with its opinion.

Upon remand, this Court, after ordering counsel for the plaintiff and for the defense to submit forms of decree in conformity with the Supreme Court opinion and after hearing arguments of the respective parties with respect thereto, has modified its decree of November 7, 1949, in accordance with the Supreme Court's opinion of November 27, 1950.

DECREE

It is therefore ordered, adjudged and decreed:

Article I

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complain states a cause of action against defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Com- [fol. 800] merce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Antitrust Act, and acts amendatory thereof and supplemental thereto.

Article II

As used in this decree:

1. "Defendant companies" shall mean all of the corporate defendants and Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company.

2. "Gypsum board" shall mean plaster board or lath (including perforated and metallized lath) and wallboard (including metallized wallboard) made from gypsum.

3. "Gypsum products" shall mean gypsum board as defined in the preceding paragraph, and plaster, block, tile and Keene's cement made from gypsum.

4. "Patents" shall mean United States Letters Patent and applications for United States Letters Patent relating to gypsum board, its processes, methods of manufacture, or use, now owned or controlled by defendant United States Gypsum Company and any such Letters Patent issued to or acquired by it within a period of five (5) years from the date of this decree, and continuations

in whole or in part, renewals, reissues, divisions, and extensions of any such Letters Patent or applications for Letters Patent.

5. "Patent Licenses" shall mean the patent license agreements which were in effect between defendant United States Gypsum Company and each of the other defendant companies at the time the complaint herein was filed and described in said complaint as follows:

[fol. 801] Agreement dated October 15, 1929, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee;

Agreement dated October 17, 1929, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee;

Agreement dated October 18, 1929, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee;

Agreement dated November 5, 1929, between United States Gypsum Company, as licensor, and Universal Gypsum and Lime Company (National Gypsum Company, as Assignee), as licensee;

Agreement dated November 25, 1929, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee;

Agreement dated April 23, 1930, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Co., as Assignee), licensee;

Agreement dated February 10, 1937, between United States Gypsum Company, as licensor, and Texas Cement Plaster Company, as licensee;

Agreement dated October 5, 1934, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee (Metallized board);

Agreement dated October 12, 1934, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Metallized board);

Agreement dated November 2, 1934, between United States Gypsum Company, as licensor, and Certain-

teed Products Corporation, as licensee (Metallized board);

Agreement dated December 4, 1934, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee (Metallized board);

Agreement dated August 14, 1935, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Metallized Board);

Agreement dated June 8, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

[fol. 802] Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

Agreement dated February 2, 1937, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated June 23, 1937, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Perforated lath);

Agreement dated January 3, 1939, between United States Gypsum Company, as licensor, and Newark Plaster Company, as licensee (Perforated lath);

and any supplement or amendment to any of said patent license agreements.

Article III

The defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of sections 1 and 2 of the Sherman Antitrust Act.

Article IV

Each of the license agreements listed in Article II hereof is adjudged unlawful under the anti-trust laws of the United States and illegal, null and void.

Article V

Each of the defendant companies and each of their respective officers, directors, agents, employees, representatives, subsidiaries, and any person acting or claiming to act under, through or for them or any of them are hereby [fol. 803] enjoined and restrained from entering into or performing any agreement or understanding among the defendants or any of them in restraint of trade and commerce in gypsum products among the several states of the United States by license agreements or other concerted action by agreement or understanding among them to fix, maintain or stabilize prices of gypsum products or the terms and conditions of sale thereof; and from engaging in, pursuant to any such agreement or understanding, any of the following acts or practices:

(1) agreeing upon any basis for the selection or classification of purchasers of gypsum products;

(2) refraining from selling gypsum products to any purchaser or any class of purchasers;

(3) agreeing upon any plan of selling or quoting gypsum products at prices calculated or determined pursuant to a delivered price plan which results in identical prices or price quotations at given points of sales or quotation by defendants using such plan;

(4) policing, investigating, checking or inquiring into the prices, quantities, terms or conditions of any offer to sell or sale of gypsum products.

Article VI

1. Defendant United States Gypsum Company is hereby ordered and directed to grant to each applicant making application therefor within five years after the effective date hereof, but only in so far as it has the right to do so, a non-exclusive license to make, use and vend [fol. 804] under any, some or all patents as hereinbefore

defined, at a reasonable, nondiscriminatory royalty or royalties for the use thereof, which said licenses shall be in form substantially as those license agreements which the Court has this day approved and ordered filed herein.

2. As to the patents which have heretofore been licensed under any of the patent licenses set out in Article II hereof, the license agreement may fix a royalty for the use of such patents not to exceed the royalty on the same article or process fixed in the license agreements set out in Article II hereof; and the tender by defendant United States Gypsum Company to each applicant for a license agreement under such patents, or any of them, in the applicable form of said license agreements so approved and ordered filed herein by the Court, shall constitute compliance by defendant United States Gypsum Company with the provisions of Paragraph 1 of Article VI in so far as such heretofore licensed patents are concerned.

3. As to any other patent, the royalty for the use of such patent or patents shall be as theretofore finally determined by this Court, or in the absence of such a final determination, as may be agreed upon between licensor and licensee. Upon receipt of written request for such a license, defendant United States Gypsum Company shall advise the applicant in writing of the applicable royalty if theretofore finally determined by this Court, or in the absence of such a determination, the royalty which it deems reasonable for the patent or patents for which the request pertains. If no such final determination shall have theretofore been made and the parties are unable to agree upon [fol. 805] a reasonable royalty at any time within sixty (60) days from the date such request for a license was received by United States Gypsum Company, the applicant therefor may forthwith apply to this Court for the determination of a reasonable royalty for the use of such patent, and the applicant shall promptly give written notice of the filing of such application to the United States Gypsum Company and to the Attorney General of the United States, who shall have the right to be heard thereon. The reasonable royalty rate or rates so determined by the Court

shall apply to such patent or patents in the licenses of the applicant and, from the date of such determination, to such patent or patents in all other licenses then outstanding or thereafter issued under this decree.

4. Where an application has been made to this Court for the determination of a reasonable royalty under paragraph 3 of this Article, the applicant may apply to the Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If the Court fixes such interim royalty rate, United States Gypsum Company shall then issue and the applicant shall accept an interim license providing for the periodic payment of royalties at such interim rate from the date of such interim license. If the applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such action shall be grounds for the dismissal of the application for determination of a reasonable royalty, and withdrawal or cancellation of the interim license. Where an interim license has been issued pursuant to this paragraph, the reasonable royalty rates for any [fol. 806] patent or patents as finally determined by the Court shall apply to such patent or patents in the licenses of the applicant and all other applicants then before the Court and shall be retroactive with respect to each such applicant to the date on which he or it first received his or its interim license under such patent or patents.

5. Each license granted hereunder may make provision for periodic inspection of the books and records of the licensee on behalf of the licensor, but any such inspection shall be by an independent auditor selected by licensor or by any other person acceptable to both the licensor and licensee, who shall report to the licensor only the amount of the royalties which were payable during the period covered by the inspection.

6. Defendant United States Gypsum Company is hereby enjoined and restrained from making any sale or other disposition of any of said patents which would deprive it of the power or authority to grant such licenses, unless in any sale, transfer or assignment it shall be required that the purchaser, transferee or assignee shall observe the provisions of this section.

Article VII

Nothing contained in this decree shall be deemed to have any effect upon the operations or activities of said defendants which are authorized or permitted by the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or the Act of Congress of August 17, 1937, commonly called the Miller-Tydings Act, or by any present or future act of Congress or amendment thereto; provided, however, nothing contained in this Article shall in any manner affect the provisions of Article VI of this decree.

[fol. 807]

Article VIII

For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice, upon written request of the Attorney General or any Assistant Attorney General, and on reasonable notice in writing addressed to any defendant company at its principal office, shall be permitted, subject to any legally recognized privilege: (a) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in its possession or under its control relating to any of the matters contained in this judgment; (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant regarding any of the matters contained in this judgment; provided, however, that either said defendant or any such officer or employee may have counsel present at any such interview. No information obtained by the means permitted in this Article shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the United States of America is a party, for the purpose of securing compliance with this decree.

Article IX

Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any

of the parties to this decree, or any other person, firm or corporation that may hereafter become bound thereby in [fol. 808] whole or in part, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of this decree, and (2) for the enforcement of compliance therewith.

Article X

Judgment is entered against the defendant companies for 50% of the costs of $2824.00 to be taxed in this proceeding, and the costs so to be taxed are hereby prorated against the several defendant companies as follows:

United States Gypsum Company	$776.60
National Gypsum Company	324.76
Certain-teed Products Corporation	155.32
The Celotex Corporation	42.36
Ebsary Gypsum Company, Inc.	42.36
Newark Plaster Company	56.48
Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company	14.12

Let the decree be entered.

By —— ——.

—— ——, 1951.

[fol. 809] License Agreement

This agreement, made this —— day of ——, A. D. ——, by and between United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as Licensor, and ——, a —— corporation, of ——, hereinafter referred to as Licensee,

Witnesseth:

that

Whereas, Licensee desires to obtain a license to make, use and sell gypsum board made according to the processes or embodying the claims of one or more of the hereinafter mentioned patents, owned by Licensor, through the full term thereof and Licensor has agreed to grant such license upon the terms and conditions hereinafter stated;

Now, therefore, in consideration of the sum of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged, and of the mutual covenants and agreements hereinafter contained, the parties hereto have agreed as follows, to-wit:

1. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license, and privilege to use the process or processes, and inventions and improvements claimed in any and all of the following letters patent:

Patent Number	*Date*	*Expiration Date*
2017022	October 8, 1935	October 8, 1952
2079338	May 4, 1937	May 4, 1954
2080009	May 11, 1937	May 11, 1954

[fol. 810] in the manufacture of gypsum board as hereinafter defined, at the plants or factories now owned or operated by Licensee, or at any other plant or factory hereafter owned or operated by it or any subsidiary, associated or affiliated company, and of manufacturing at any such place or places, selling and using in the United States of America, and the territories and possessions thereof, gypsum board manufactured under the processes or embodying the inventions and improvements claimed in said patents, for the full term of the last to expire of said letters patent, including any reissues thereof.

Licensor also agrees promptly to disclose to Licensee all information and formulae, not heretofore disclosed to Licensee, which it now has or may obtain relating to the process of making a cellular product through the formation of tenacious foam and mixing the foam with a cementitious material, as set forth and claimed in applications for United States Letters Patent as originally filed by Carlisle K. Roos, Serial Nos. 73197, 3477, and 142155, and by Erik C. Bayer, Serial No. 661723, or in Letters Patent Nos. 2017022, 2079338, and 2080009, in so far as the same is or may be applied to gypsum, and including all information and formulae for the manufacture of gypsum board embodying the inventions and improvements set forth and claimed in the aforesaid applications or letters patent.

2. Licensee agrees to pay to Licensor for the right and privilege granted under Paragraph 1 above a license fee or royalty at the rate of —— per cent (——%) of Licensee's selling price of all gypsum board manufactured under any of the processes or embodying any of the inventions covered by said patents and sold by it during the term hereof, provided that no license fee or royalty shall be payable on gypsum board exported by Licensee to [fol. 811] any foreign country.

Licensee's selling price shall mean the net price at Licensee's shipping point after deducting transportation charges and cash discounts allowed by Licensee; provided however, that in the case of laminated gypsum board, except with a metallized surface, the net price for the purposes hereof shall be deemed to be Licensee's net price at the time of sale in the same market area, determined as above provided, for the quantity of plain gypsum board actually used or incorporated therein.

3. The license herein granted shall be personal to the Licensee and shall not be sold, assigned or transferred, either voluntarily, or by operation of law, without the written consent of Licensor; *Provided, however,* that the license may be assigned by Licensee to any company acquiring all of Licensee's gypsum and gypsum board business, and assets pertaining thereto, or all of the capital stock of Licensee, on condition that Licensee shall first obtain, and deliver to Licensor, such assignee's written agreement to assume all of the obligations of Licensee hereunder and agreeing to be bound by all of the terms and conditions hereof.

4. Licensee agrees to keep separate, full and accurate books of accounts and records showing the exact quantity of all gypsum board manufactured under any of the processes or embodying any of the inventions covered by said patents and sold by it, together with the Licensee's selling price thereof, and agrees that on or before the 20th day of each calendar month it will deliver to Licensor at its office in Chicago, Illinois, true written returns, verified under oath by an officer or other authorized agent of Licensee, setting forth the quantity of all such gypsum

board manufactured by it, and sold during the preceding [fol. 812] calendar month, and the amount of royalty due and payable on account of such gypsum board so manufactured and sold. Licensee also agrees to pay to Licensor at its said office on or before the 20th day of each calendar month the hereinbefore stipulated royalties or license fees which may then be due under the terms of this agreement on account of all such gypsum board manufactured by it and sold during the preceding calendar month.

5. Licensor shall have the right, at all reasonable times and for such period or periods of time as it may from time to time determine, to verify the correctness of the royalty payments by periodic inspection of the accounts and records of Licensee referred to in the next preceding paragraph, provided, however, that such inspection shall be made by an independent auditor, or by any other person acceptable to both Licensor and Licensee, who shall report to Licensor only the amount of the royalties which were payable during the period covered by the inspection. If Licensee shall object to the independent auditor selected by Licensor, then Licensor shall name, in writing addressed to Licensee, three certified public accountants of good standing, not directly or indirectly employed by it or in any other manner connected with it, and if Licensee shall not within ten days thereafter accept in writing any one of them, then Licensor shall have the right to designate one of the three to act as the independent auditor. In any event, the expense of making any such audit shall be borne equally by the parties.

6. Licensee agrees that all gypsum board manufactured and sold by it under or embodying the claims of any of such patents shall be distinctly marked with the word "Patent" followed by the numbers of any of the aforesaid [fol. 813] patents, the claims of which are embodied in said gypsum board, and Licensee further agrees to distinctly mark said gypsum board with the words "Licensed under the above patents and also under the process claims of patent," followed by the number of any of the aforesaid patents of which any process claimed therein is utilized in the manufacture of said product; and Licensee further agrees to distinctly mark said gypsum board with any other

appropriate notice as Licensor shall specify from time to time.

7. In the event either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements to be kept or performed by it under the provisions hereof, then the other party may at its election serve upon the party in default written notice of intention to terminate this license and specifying the alleged default. If the party in default shall not cure the default so specified within thirty (30) days thereafter then the other party may, subject to the provisions of paragraph 8 below, cancel and terminate this agreement without any court action by serving upon the party in default written notice of its election so to do; provided, that neither party shall be relieved thereby from any liability accrued at the time of such termination.

8. If a party upon whom a default notice is served under Paragraph 7 above shall deny the specified defaults, in whole or in part, then the right of the other party to terminate this license by reason of the defaults alleged shall be suspended, provided the party served shall (a) within the said thirty (30) day period provided in Paragraph 7 above cure any defaults which are not denied, and (b) submit to arbitration the question as to whether the specifically [fol. 814] denied defaults in fact occurred. In the event the arbitrators find that one or more of the alleged defaults have occurred, then the party in default shall cure the same within thirty (30) days from the date of the finding of such arbitrators. If not cured within said period the party serving such default notice, in addition to and without limitation upon any other rights and remedies which it may have hereunder, may cancel and terminate this agreement without any court action by serving upon the party in default written notice of its election so to do; provided, that neither party shall be relieved thereby of any liability accrued at the time of such termination.

All arbitrations had under this Paragraph 8 shall be in accordance with the Rules then obtaining of the American Arbitration Association, excepting only that the time allowed for objecting to arbitrators, or indicating the order of preference for arbitrators, as submitted to the parties

for such purpose by said Association or under its Rules, shall in no event be less than fifteen (15) days. The finding or findings of the arbitrators shall be final and conclusive. In the event the arbitrators shall find any license fees or royalties, or other sums of money herein required to be paid by the Licensee to the Licensor, are due and owing, the arbitrators shall in their findings fix and determine the amount thereof, and Licensor shall have the right (but without being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the Arbitrators in any court of competent jurisdiction.

9. In the event the Licensee shall at any time be adjudicated a bankrupt, then the license hereunder shall immediately be and become cancelled and terminated, but the Licensor shall not thereby be prevented from collecting all [fol. 815] license fees or royalties accrued hereunder at the time of such termination.

10. The waiver of any breach by either party shall not be interpreted as constituting a waiver of any other or further breach or breaches. Either party may specifically enforce this contract, or any of the terms, conditions and covenants thereof, by injunction or in such other manner as may be permitted by law.

11. Any notice required or permitted to be served by either party upon the other under the terms hereof, may be served by mailing the same to the other party, postage prepaid and registered, addressed to such other party at its last known principal office, and the deposit of such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder.

12. In case Licensor shall grant to any other person any license under the aforesaid patents for the manufacture, sale or use of gypsum board made by use of the processes or embodying the claims or inventions claimed in any of said patents, or shall grant any right under any such license, upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms or extend to it the same right granted to any such other person.

13. The term "gypsum board" shall be understood to mean all board made of gypsum, by whatever name called, having the characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths, laminated gypsum board, and all other gypsum boards. The term "laminated gypsum board", means a unit or assembly of units consisting of a gypsum board having [fol. 816] attached to one or both faces thereof a layer or layers of gypsum board, insulation board, decorated paper simulating wood veneers or tile, or other material, but as used in the proviso to Paragraph 2 above shall not include gypsum board having a metallized surface.

14. If Licensor shall at any time during the existence of this agreement make or obtain any improvement for the formation of the bubbles or foam described in the process set forth in applications for United States Letters Patent as originally filed by Carlisle K. Roos, Serial No. 733197, 3477, and 142155, and by Erik C. Bayer, Serial No. 661723, or in Letters Patent Nos. 2017022, 2079338, and 2080009, or the method of its introduction into the core of gypsum board, and which improvement is covered by the claims of the aforesaid applications and letters patent, and shall itself use the same in its own maufacture, then so long as Licensee shall continue to pay the license fees or royalties hereinbefore stipulated, the right, license or privilege herein contained shall be extended to and include the use of said improvement in the manufacture by Licensee of gypsum board, subject to all of the terms and conditions herein contained, except only that Licensee shall not be required to pay any additional royalty or license fee therefor. It is further agreed that if a patent or patents shall be granted or issued for or upon said improvement, then all of the provisions of this agreement shall apply to the improvement set forth and claimed in any such patent or patents. Licensor will promptly notify Licensee of the general adoption by it of any such improvement in its own manufacture, together with such information as it may possess as to the use thereof in the manufacture of [fol. 817] gypsum board.

15. The Licensor agrees at any time during the term

hereof to extend to Licensee, upon its written request, an indivisible and non-exclusive license or privilege to use the process or processes set forth and claimed in said Letters Patent Nos. 2017022, 2079338, and 2080009, in the manufacture in Licensee's plants of any other gypsum product not specifically covered by this agreement, and in which product Licensor shall use the same in its own manufacture, and to sell the same, upon the payment to Licensor of —— per cent (——%) of Licensee's selling price of all of such other gypsum product or products in the manufacture of which said process or processes are used), manufactured and sold by Licensee, upon the same terms as set forth herein and subject to all of the conditions hereof, in which event in the agreement for the same there shall be substituted for the words "gypsum board" the name of such other product or products. An agreement containing all of said terms and conditions shall be reduced to writing and signed by both parties before the same shall become effective.

16. This Agreement shall be effective as of the —— day of ——.

In witness whereof the parties hereto have caused these presents to be signed in duplicate by their respective presidents, attested by their respective secretaries, and [fol. 818] their corporate seal to be hereunto affixed, the day and year first above written.

United States Gypsum Company, By —— ——, President.

Attest: —— ——, Secretary.

—— ——, President.

Attest: —— ——, Secretary.

[fol. 819] LICENSE AGREEMENT

This Agreement, made this —— day of ——, A. D. ——, by and between United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as Licensor, and —— ——, a —— corporation, of ——, hereinafter referred to as Licensee,

Witnesseth:

That, whereas, Licensor is the owner of certain patent rights set forth in Schedule A hereunto annexed, relating to building structures or elements for said structures; and

Whereas, Licensee desires an indivisible and non-exclusive license from Licensor herein, to manufacture, use and sell gypsum board under said patent rights set forth in Schedule A hereof, and Licensor has agreed to grant such license upon the terms and conditions, but subject to the limitations hereinafter stated;

Now, therefore, in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto agree as follows, to-wit:

1. Licensor agrees to and does hereby give and grant unto Licensee the indivisible and non-exclusive right, license and privilege to make, use, and sell gypsum board having a metallized surface, embodying the inventions disclosed and claimed in the patent set forth in Schedule A, Provided, that the right, license, and privilege herein and hereby granted is specifically limited to the gypsum board and building structures incorporating the same as set forth in Schedule A, and does not extend to any other product or structure.

[fol. 820] 2. Licensee agrees to pay to Licensor for the right and privilege granted under Paragraph 1 above, a royalty for all gypsum board having a metallized surface manufactured and sold by Licensee and which is covered by the claims of the patent set forth in Schedule A, or which is to be used in making structures covered by said patent or patent rights, at the rate of —— cents (——¢) per thousand square feet of surface area where only one face is metallized, and at the rate of —— cents (——¢) per thousand square feet where both faces are metallized, of any product covered by the aforesaid patent or any of said patent rights.

3. The license herein granted is personal to the Licensee and shall not be sold, assigned or transferred, either voluntarily or by operation of law, without the written consent of Licensor; Provided, however, that the license may be assigned by Licensee to any company acquiring all of Li-

censee's gypsum and gypsum board business, and assets pertaining thereto, on condition that Licensee shall first obtain, and deliver to Licensor, such assignee's written agreement to assume all of the obligations of Licensee hereunder and agreeing to be bound by all of the terms and conditions hereof.

4. In case Licensor shall grant to any other person any license under the aforesaid patent or patent rights for the manufacture, sale or use of gypsum board having a metallized surface and embodying the claims or inventions set forth and claimed therein, upon terms more favorable than those granted hereunder to Licensee, then Licensor shall grant to Licensee a license upon the same terms, or will extend to Licensee the same right granted to such other licensee.

[fol. 821] 5. Licensee agrees to keep true and accurate books of account showing the quantity of all gypsum board having one or more metallized surfaces, manufactured and sold by it under the rights, licenses, and privileges herein granted. Licensor shall have the right, at all reasonable times and for such period or periods of time as it may from time to time determine, to verify the correctness of the royalty payments by periodic inspection of the accounts and records of Licensee referred to in the next preceding sentence, provided, however, that such inspection shall be made by an independent auditor, or by any other person acceptable to both Licensor and Licensee, who shall report to Licensor only the amount of the royalties which were payable during the period covered by the inspection. If Licensee shall object to the independent auditor selected by Licensor, then Licensor shall name, in writing addressed to Licensee, three certified public accountants of good standing, not directly or indirectly employed by it or in any other manner connected with it, and if Licensee shall not within ten days thereafter accept in writing any one of them, then Licensor shall have the right to designate one of the three to act as the independent auditor. In any event, the expense of making any such audit shall be borne equally by the parties.

6. Licensee agrees that on or before the 15th day of each calendar month it will deliver to Licensor at its office

in Chicago, Illinois, a written report, verified by an officer or other authorized agent of Licensee, showing the quantity of all such gypsum board manufactured by it (a) having one metallized surface, and (b) having two metallized surfaces, and sold during the preceding calendar month. Li- [fol. 822] censee also agrees to pay to Licensor at its said office on or before the 15th day of each calendar month the hereinbefore stipulated royalty which may then be due under the terms of this agreement on account of all such gypsum board so sold by Licensee during the preceding calendar month. For the purposes of this agreement a sale shall be considered to have been made not later than the date on which the goods are shipped by Licensee, without regard to passing of title or whether the goods are shipped on consignment, or otherwise.

7. Licensee agrees that all gypsum board having one or more metallized surfaces sold by it hereunder shall be distinctly marked with the word "Patent" followed by the number of the aforesaid patent, the claims of which are embodied in said gypsum board, and also with the words "Licensed under the above patent". Licensee further agrees to distinctly mark said gypsum board with such other appropriate notice as Licensor shall specify from time to time.

8. In the event Licensee shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements to be kept or performed by it under the provisions hereof, then Licensor may at its election serve upon Licensee written notice specifying the alleged default and stating, if Licensor so desires, its intention to terminate this license. If Licensee shall not cure the default so specified within thirty (30) days thereafter, then Licensor may, subject to the provisions of Paragraph 9 below, maintain any appropriate action hereunder, at law or in equity, for collection of royalties, or for damages, or for any other appropriate remedy, or Licensor may, if such intention was stated in the notice of default, cancel [fol. 823] and terminate this agreement without any court action, by serving upon Licensee written notice of its eleciton so to do; provided, that Licensee shall not be relieved

thereby from any liability accrued at the time of such termination.

9. If Licensee shall deny, in whole or in part, the defaults specified in a notice served by Licensor under Paragraph 8 above, then Licensor's right to proceed as provided in Paragraph 8 above shall be suspended, provided Licensee shall (a) within the said thirty (30) day period provided in Paragraph 8 above cure any defaults which are not denied, and (b) submit to arbitration the question as to whether the specifically denied defaults in fact occurred. In the event the arbitrators find that one or more of the alleged defaults have occurred, then Licensee shall cure the same within thirty (30) days from the date of the finding of such arbitrators. If not cured within said period then Licensor may proceed in such manner as it may elect as provided in Paragraph 8 above.

All arbitrations had under this Paragraph 9 shall be in accordance with the Rules then obtaining of the American Arbitration Association, excepting only that the time allowed for objecting to arbitrators, or the order of preference for arbitrators, as submitted to the parties for such purpose by said Association or under its Rules, shall in no event be less than fifteen (15) days. The finding or findings of the arbitrators shall be final and conclusive. In the event the arbitrators shall find any royalties, or other sums of money herein required to be paid by the Licensee to the Licensor, are due and owing, the arbitrators shall in their findings fix and determine the amount thereof, and Licensor shall have the right (but without [fol. 824] being limited to such remedy) to have a summary judgment entered in its favor against Licensee for the amount so found to be due by the arbitrators in any court of competent jurisdiction.

10. In the event (a) that Licensee shall be adjudicated a bankrupt, or (b) a receiver shall be appointed for Licensee, whose appointment shall not be vacated within sixty (60) days thereafter, then the rights, licenses and privileges herein granted to Licensee shall forthwith cease and determine, without further action on the part of the Licensor, provided that such termination shall not relieve Licensee of any liability then existing.

11. The waiver by Licensor of any breach on the part of the Licensee shall not be interpreted as constituting a waiver of any further or other breach or breaches.

12. Any notice required or permitted to be served by either party upon the other under the terms hereof, may be served by mailing the same to the other party, postage prepaid and registered, addressed to such party at its last known principal office, and the deposit of such notice in the United States mails, registered, postage prepaid and so addressed, shall constitute service of notice hereunder.

13. The term "gypsum board" shall be understood to mean all board made of gypsum, by whatever name called, having the characteristics of gypsum plasterboard or gypsum wallboard, irrespective of the purpose for which the same may be sold or used, and shall include gypsum laths, laminated gypsum board, and all other gypsum boards.

14. Except as otherwise provided herein, this agreement shall remain in force for the full term of the patent rights [fol. 825] set forth in Schedule A, and shall be binding upon and inure to the benefit of the parties hereto and their successors and assigns; provided that nothing in this paragraph contained shall be construed to permit any assignment hereof except as herein otherwise specifically provided. Nothing herein contained shall be construed to relieve Licensee from the payment of royalties under license agreement of even date herewith under Letters Patent Nos. 2017022, 2079338, and 2080009, it being understood that the royalties provided herein are in addition to the royalties or license fees provided in such other agreement. In the event the exclusive right and license of Licensor as set forth in Schedule A hereof shall terminate for any reason whatever, whether on account of Licensor's default or otherwise, and such termination shall result in the termination of any of the rights, licenses and privileges herein granted to the Licensee, then this agreement shall immediately terminate without further act on the part of either of the parties hereto, and without liability of any kind by Licensor to Licensee on account thereof, provided that Licensee shall not thereby be released from any then existing liability to Licensor.

15. Licensor hereby represents and warrants that it has the right to grant the license herein granted.

16. This agreement shall be effective as of the —— day of ——, ——.

In witness whereof, the parties hereto have caused these presents to be signed by their respective Presidents, attested by their respective Secretaries, and their corporate [fol. 826] seals to be hereunto affixed, in duplicate, the day and year first above written.

United States Gypsum Company, By —— ——, President.

Attest: —— ——, Secretary.

By —— ——, President.

Attest: —— ——, Secretary.

[fol. 827]

SCHEDULE A

Licensor has the exclusive right and license to make, use and sell building structures or elements for building structures where insulation is obtained by the use of gypsum board having a metallized surface under the following patent known as the Alfol patent:

Inventor	*Patent No.*	*Issue Date*
Schmidt	2,015,817	October 1, 1935

together with any divisions, continuations, renewals or reissues thereof, but it is understood that the term "building structures" is limited to the walls, floors, roofs and ceilings of buildings and does not include pipes or ducts, or other heating apparatus installed in the building, or refrigerating or cooling apparatus or structures whether built into the building or not. Licensor has no right or license under the said patent to use metal foil for insulation except where such foil is applied to a non-metallic member as a facing therefor.

I hereby certify that the within is a true and correct copy of the Preliminary Statement as filed with the District Court, March 6, 1951, and stipulated to by all counsel.

Hugh Lynch, Jr., Attorney for U. S. Gypsum Co.

[fol. 828] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PRELIMINARY STATEMENT AND SUGGESTED FORM OF REVISED DECREE BY NATIONAL GYPSUM CO.—Filed March 6, 1951

This cause came on for trial before this Court on November 15, 1943. At the conclusion of plaintiff's presentation of the case, defendants moved, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, for judgment dismissing the complaint on its merits. The motion of defendants was granted August 6, 1946. The judgment so rendered by this Court was reversed by the Supreme Court of the United States, and the case was remanded to this Court for further proceedings in conformity with the opinion of the Supreme Court (333 U. S. 364).

Following the remand, the plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, moved for summary judgment in its favor upon the pleadings and all of the proceedings which theretofore had been had in the case, or, in the alternative, for such further proceedings as this Court might direct, and defendants, by direction of the Court, filed proffers of proof.

[fol. 829] Argument by counsel for the respective parties upon the motion of plaintiff was heard by the Court, and after due consideration of such argument and of defendants' proffers of proof, Garrett, J. and Jackson, J., constituting a majority of the Court, announced a ruling to the effect that plaintiff's motion for summary judgment would be granted, and Stephens, J., who presided during the trial, announced his dissent from such ruling.

Thereafter counsel for plaintiff and counsel for certain of the defendants submitted forms of final decrees for the consideration of the Court and also suggested findings of fact, the latter to be considered in the event the Court should deem it necessary to make any findings of fact additional to those originally found by it and to those stated in the opinion of the Supreme Court.

In due course, the Court heard arguments respecting the proposed decrees and the suggested findings of fact,

and full consideration has been given thereto and to all prior proceedings—all being considered in the light of the decision of the Supreme Court which, as understood by the majority of this Court, held that the defendants acted in concert to restrain trade and commerce in the gypsum board industry and monopolized said trade and commerce among the several states in that section hereinafter referred to as the eastern territory of the United States, which section embraces all the states of the Unted States westward from the eastern coast thereof to the Rocky Mountains and including New Mexico, Colorado, Wyoming, and the eastern half of Montana.

[fol. 830] Whereupon this Court, on November 7, 1949, entered its decree sustaining plaintiff's motion for summary judgment and granting relief which it deemed appropriate to its adjudication. Plaintiff thereupon appealed to the Supreme Court seeking to have the scope of the relief enlarged, and certain defendants appealed to the Supreme Court for a reversal of the judgment, which latter appeal was dismissed by the Supreme Court on May 29, 1950. On November 27, 1950, the Supreme Court rendered an opinion on the plaintiff's appeal, affirming this Court's adjudication of Sherman Act violation. Nevertheless, the Supreme Court reversed the decree heretofore entered herein and remanded the cause to this Court with instructions to modify its decree and for further proceedings in conformity with its opinion.

Upon remand, this Court, after ordering counsel for the plaintiff and for the defense to submit forms of decree in conformity with the Supreme Court opinion and after hearing arguments of the respective parties with respect thereto, has modified its decree of November 7, 1949, in accordance with the Supreme Court's opinion of November 27, 1950.

DECREE

It is therefore ordered, adjudged and decreed:

Article I

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states a cause of action against defendants under the Act of Congress of

July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Antitrust Act, and acts amendatory thereof and supplemental thereto.

[fol. 831] Article II

As used in this decree:

1. "Defendant companies" shall mean all of the corporate defendants and Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company.

2. "Gypsum board" shall mean plaster board or lath (including perforated and metallized lath) and wallboard (including metallized wallboard) made from gypsum.

3. "Gypsum products" shall mean gypsum board as defined in the preceding paragraph, and plaster, block, tile and Keene's cement made from gypsum.

4. "Patents" shall mean United States Letters Patent and applications for United States Letters Patent relating to gypsum board, its processes, methods of manufacture, or use, now owned or controlled by defendant United States Gypsum Company and any such patents issued to or acquired by it within a period of five (5) years from the date of this decree, and continuations in whole or in part, renewals, reissues, divisions, and extensions of any such patent or patent applications.

5. "Patent Licenses" shall mean the patent license agreements which were in effect between defendant United States Gypsum Company and each of the other defendant companies at the time the complaint herein was filed and described in said complaint as follows:

(Here list contracts included in decree of 11/7/49).

Article III

The defendant companies have acted in concert in restraint of trade and commerce among the several states in [fol. 832] the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of sections 1 and 2 of the Sherman Antitrust Act.

Article IV

Each of the license agreements listed in Article II hereof is adjudged unlawful under the anti-trust laws of the United States and illegal, null and void.

Article V

Each of the defendant companies and each of their respective officers, directors, agents, employees, representatives and subsidiaries are hereby enjoined and restrained from entering into or performing any agreement or understanding among the defendants or any of them in restraint of trade and commerce in gypsum products among the several states of the United States by license agreements or other concerted action by agreement or understanding among them or any of them to fix, maintain or stabilize prices of gypsum products or the terms and conditions of sale thereof; and from engaging in, pursuant to any such agreement or understanding, any of the following acts or practices:

1. Agreement upon or adhering to any basis for the selection or classification of purchasers of gypsum products.

2. Refraining from selling gypsum products to any purchaser or any class of purchasers.

3. Agreeing upon any plan of selling or quoting gypsum [fol. 833] products at prices calculated or determined pursuant to a delivered price plan which results in identical prices or price quotations at given points of sales or quotation by defendants using such plan.

4. Policing, investigating, checking or inquiring into the prices, quantities, terms or conditons of any offer to sell or sale of gypsum products.

Article VI

1. Defendant United States Gypsum Company is hereby ordered and directed to grant to each applicant therefor within five (5) years after the effective date hereof a non-exclusive license to make, use and vend under any, some or all of the patents and patent applications now or hereafter owned or controlled by it relating to gypsum board;

and is hereby enjoined from making any sale or other disposition of any of said patents which deprives it of the power or authority to grant such licenses, unless in any sale, transfer or assignment it shall be required that the purchaser, transferee or assignee shall observe the provisions of this article.

2. Each license granted hereunder may make provision for periodic inspection of the books and records of the licensee on behalf of the licensor, but any such inspection shall be by an independent auditor, or by any other person acceptable to both the licensor and licensee, who shall report to the licensor only the amount of the royalties which were payable during the period covered by the inspection.

3. Upon receipt of written request for a license under the provisions of this article, defendant United States [fol. 834] Company shall advise the applicant in writing of the royalty which it deems reasonable for the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within 60 days from the date such request for a license was received by United States Gypsum Company, the applicant therefor may forthwith apply to this Court for the determination of a reasonable royalty, and United States Gypsum Company shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General, who shall have the right to be heard thereon. The reasonable royalty rates, if any, determined by the Court shall apply to the applicant and all other licensees under the same patent or patents. Pending the completion of any such proceeding the applicant shall have the right to make, use and vend under the patents to which his application pertains without payment of royalty or other compensation except as provided in paragraph 4 of this article.

4. Where an application has been made to this Court for the determination of a reasonable royalty under paragraph 3 of this article, United States Gypsum Company may apply to the Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If the Court fixes such interim royalty rate,

United States Gypsum Company shall then issue and the applicant shall accept a license, or, as the case may be, a sublicense, providing for the periodic payment of royalties at such interim rate from the date of the filing of such application by the applicant. If the applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such action shall be [fol. 835] grounds for the dismissal of his application. Where an interim license or sublicense has been issued pursuant to this paragraph, reasonable royalty rates, if any, as finally determined by the Court shall be retroactive for the applicant and for all other licensees under the same patent or patents whose licenses provide for a higher royalty rate to a date to be fixed by the Court.

Article VII

Nothing contained in this judgment shall be deemed to have any effect upon the operations or activities of the defendants which are authorized or permitted by the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or the Act of Congress of August 17, 1937, commonly called the Miller-Tydings Act, or by any present or future act of Congress or amendment thereto; provided, however, nothing contained in this article shall in any manner affect the provisions of Article VI of this judgment.

Article VIII

For the purpose of securing compliance with this judgment, authorized representatives of the Department of Justice, upon written request of the Attorney General or an Assistant Attorney General to any defendant company and upon reasonable notice, shall be permitted, subject to any legally recognized privilege, access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this judgment. Any authorized representative of the Department of Justice shall be permitted to interview officers or employees of any defendant company regarding any

[fol. 836] such matters, subject to the reasonable convenience of said defendant but without restraint or interference from it; provided, however, that such officer or employee may have counsel present. No information obtained by the means provided in this article shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this judgment or as otherwise required by law.

Article IX

Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this judgment, or any other person, firm or corporation that may hereafter become bound thereby in whole or in part, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of this judgment, and (2) for the enforcement of compliance therewith and the punishment of violations thereof.

Article X

Judgment is entered against the defendant companies for 50% of the costs to be taxed in this proceeding, and the costs so to be taxed are hereby prorated among the several defendant companies as follows:

United States Gypsum Company	$776.60
National Gypsum Company	324.76
Certain-teed Products Corporation	155.32
The Celotex Corporation	42.36
Ebsary Gypsum Company, Inc.	42.36
[fol. 837]	
Newark Plaster Company	56.48
Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company	14.12

Let the decree be entered.

By —— ——.

I hereby certify that the within is a true and correct copy of the Preliminary Statement as filed with the District Court, March 6, 1951, and stipulated to by all counsel.
Hugh Lynch, Jr., Attorney for U. S. Gypsum Co.

[fol. 838] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PRELIMINARY STATEMENT AND SUGGESTED FORM OF REVISED DECREE BY CERTAIN-TEED PRODUCTS CORP.—Filed March 6, 1951

This cause came on for trial before this Court on November 15, 1943. At the conclusion of plaintiff's presentation of the case, defendants moved, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, for judgment dismissing the complaint on its merits. The motion of defendants was granted August 6, 1946. The judgment so rendered by this Court was reversed by the Supreme Court of the United States, and the case was remanded to this Court for further proceedings in conformity with the opinion of the Supreme Court (333 U. S. 364).

[fol. 839] Following the remand, the plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, moved for summary judgment in its favor upon the pleadings and all of the proceedings which theretofore had been had in the case, or, in the alternative, for such further proceedings as this Court might direct, and defendants, by direction of the Court, filed proffers of proof.

Argument by counsel for the respective parties upon the motion of plaintiff was heard by the Court, and after due consideration of such argument and of defendants' proffers of proof, Garrett, J. and Jackson, J., constituting a majority of the Court, announced a ruling to the effect that plaintiff's motion for summary judgment would be granted, and Stephens, J., who presided during the trial, announced his dissent from such ruling.

Thereafter counsel for plaintiff and counsel for certain of the defendants submitted forms of final decrees for the

consideration of the Court and also suggested findings of fact, the latter to be considered in the event the Court should deem it necessary to make any findings of fact additional to those originally found by it and to those stated in the opinion of the Supreme Court.

In due course, the Court heard arguments respecting the proposed decrees and the suggested findings of fact, and full consideration was given thereto and to all prior proceedings—all being considered in the light of the decision of the Supreme Court which, as understood by the majority of this Court, held that the defendants acted in concert to [fol. 840] restrain trade and commerce in the gypsum board industry and monopolize said trade and commerce among the several states in that section hereinafter referred to as the eastern territory of the United States, which section embraces all the states of the United States westward from the eastern coast thereof to the Rocky Mountains and including New Mexico, Colorado, Wyoming, and the eastern half of Montana.

Thereafter this Court, on November 7, 1949, entered its decree sustaining plaintiff's motion for summary judgment and granting relief which it deemed appropriate to its adjudication. Plaintiff thereupon appealed to the Supreme Court seeking to have the scope of the relief enlarged, and certain defendants appealed to the Supreme Court for a reversal of the judgment, which latter appeal was dismissed by the Supreme Court on May 29, 1950. On November 27, 1950, the Supreme Court rendered an opinion on the plaintiff's appeal, affirming this Court's adjudication of Sherman Act violation, holding there was concerted action through the fixed-price licenses and accepting as true the underlying facts in the defendants' proof by proffer. Nevertheless, the Supreme Court reversed the decree heretofore entered herein and remanded the cause to this Court with instructions to modify its decree and for further proceedings in conformity with its opinion.

Upon remand, this Court, after ordering counsel for the plaintiff and for the defense to submit forms of decree in conformity with the Supreme Court opinion and after hearing arguments of the respective parties with respect thereto, has modified its decree of November 7, 1949, in

[fol. 841] accordance with the Supreme Court's opinion of November 27, 1950.

DECREE

It is therefore ordered, adjudged and decreed:

Article I

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states a cause of action against defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Antitrust Act, and acts amendatory thereof and supplemental thereto.

Article II

As used in this decree:

1. "Defendant companies" shall mean all of the corporate defendants and Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company.

2. "Gypsum board" shall mean plaster board or lath including perforated and metallized lath) and wallboard (including metallized wallboard) made from gypsum.

3. "Gypsum products" shall mean gypsum board as defined in the preceding paragraph, and plaster, block tile and Keene's cement made from gypsum.

4. "Patents" shall mean United States Letters Patent and applications for United States Letters Patent relating to gypsum board, its processes, methods of manufacture, [fol. 842] or use, now owned or controlled by defendant United States Gypsum Company and any such Letters Patent issued to or acquired by it within a period of five (5) years from the date of this decree, and continuations in whole or in part, renewals, reissues, divisions, and extensions of any such Letters Patent or applications for Letters Patent.

5. "Patent Licenses" shall mean the patent license agreements which were in effect between defendant United States Gypsum Company and each of the other defendant

companies at the time the complaint herein was filed and described in said complaint as follows:

Agreement dated October 15, 1929, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee;

Agreement dated October 17, 1929, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee;

Agreement dated October 18, 1929, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee;

Agreement dated November 5, 1929, between United States Gypsum Company, as licensor, and Universal Gypsum and Lime Company (National Gypsum Company, as Assignee), as licensee;

Agreement dated November 25, 1929, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee;

Agreement dated April 23, 1930, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Co., as Assignee), licensee;

Agreement dated February 10, 1937, between United States Gypsum Company, as licensor, and Texas Cement Plaster Company, as licensee;

[fol. 843] Agreement dated October 5, 1934, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee (Metallized board);

Agreement dated October 12, 1934, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Metallized board);

Agreement dated November 2, 1934, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Metallized board);

Agreement dated December 4, 1934, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee (Metallized board);

Agreement dated August 14, 1935, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Metallized Board);

Agreement dated June 8, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

Agreement dated February 2, 1937, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated June 23, 1937, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Perforated lath);

Agreement dated January 3, 1939, between United States Gypsum Company, as licensor, and Newark Plaster Company, as licensee (Perforated lath);

[fol. 844] and any supplement or amendment to any of said patent license agreements.

Article III

The defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of sections 1 and 2 of the Sherman Antitrust Act.

Article IV

Each of the license agreements listed in Article II hereof is adjudged unlawful under the antitrust laws of the United States and illegal, null and void.

Article V

Each of the defendant companies and each of their respective officers, directors, agents, employees, representatives and subsidiaries are hereby enjoined and restrained from entering into or performing any agreement or understanding among the defendants or any of them in restraint of trade and commerce in gypsum products among the several states of the United States by license agreements or other concerted action by agreement or understanding among them or any of them to fix, maintain or stabilize prices of gypsum products or the terms and conditions of sale thereof; and from engaging in, pursuant to any such agreement or understanding, any of the following acts or practices:

[fol. 845] (1) agreeing upon any basis for the selection or classification of purchasers of gypsum products;

(2) refraining from selling gypsum products to any purchaser or any class of purchasers;

(3) agreeing upon any plan of selling or quoting gypsum products at prices calculated or determined pursuant to a delivered price plan which results in identical prices or price quotations at given points of sales or quotation by defendants using such plan;

(4) policing, investigating, checking or inquiring into the prices, quantities, terms or conditions of any offer to sell or sale of gypsum products.

Article VI

1. Defendant United States Gypsum Company is hereby ordered and directed to grant to each applicant making application therefor within five years after the effective date hereof, a non-exclusive license to make, use and vend under any, some or all of the patents as hereinbefore defined; and is hereby enjoined from making any sale or other disposition of any of said patents which deprives it of the power or authority to grant such licenses, unless it requires, as a condition of such sale, transfer or assignment, that the purchaser, transferee or assignee shall observe the [fol. 846] requirements of Article VI of this decree and

unless the purchaser, transferee or assignee shall file with this Court, prior to consummation of said transaction, an undertaking to be bound by said articles of this decree.

2. Each license granted hereunder may make provision for periodic inspection of the books and records of the licensee on behalf of the licensor, but any such inspection shall be by an independent auditor, or by any other person acceptable to both the licensor and licensee, who shall report to the licensor only the amount of the royalties which were payable during the period covered by the inspection.

3. Upon receipt of written request for a license under the provisions of this article, defendant United States Gypsum Company shall advise the applicant in writing of the royalty which it deems reasonable for the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within 60 days from the date such request for a license was received by United States Gypsum Company, the applicant therefor may forthwith apply to this Court for the determination of a reasonable royalty, and shall promptly give notice thereof to the United States Gypsum Company and the Attorney General, who shall have the right to be heard thereon. Upon the filing of such application and pending the completion of any such proceeding the applicant shall have the right to make, use and vend under the patents to which his applica- [fol. 847] tion pertains and shall make payment of royalty or other compensation as provided in paragraph 4 of this article.

4. Where an application has been made to this Court for the determination of a reasonable royalty under paragraph 3 of this article, applicant shall at the same time also apply to the court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If the court fixes such interim royalty rate, United States Gypsum Company shall then issue and the applicant shall accept a license, or, as the case may be, a sublicense, providing for the periodic payment of royalties at such interim rate from the date of the filing of such application by the applicant. If the applicant fails to make such application for an interim royalty rate or fails to accept such license or fails to pay the interim royalty in ac-

cordance therewith, such action shall be grounds for the dismissal of his application. Where an interim license or sublicense has been issued pursuant to this paragraph, reasonable royalty rates, if any, as finally determined by the court shall be retroactive for the applicant to the date of first use of said patent or patents and for all other licensees under the same patent or patents to the date of such final determination.

[fol. 848] Article VII

Nothing contained in this decree shall be deemed to have any effect upon the operation or activities of said defendants which are authorized or permitted by the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or the Act of Congress of August 17, 1937, commonly called the Miller-Tydings Act, or by any present or future act of Congress or amendment thereto; provided, however, nothing contained in this Article shall in any manner affect the provisions of Article VI of this decree.

Article VIII

For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice, upon written request of the Attorney General or any Assistant Attorney General, and on reasonable notice in writing addressed to any defendant company at its principal office, shall be permitted, subject to any legally recognized privilege: (a) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in its possession or under its control relating to any of the matters contained in this judgment; (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant regarding any of the matters contained in this judgment; provided, however, that either said defendant or any such officer or employee may have [fol. 849] counsel present at any such interview. No information obtained by the means permitted in this Article shall be divulged by any representative of the Department of Justice to any person other than a duly authorized repre-

sentative of the Department of Justice, except in the course of legal proceedings in which the United States of America is a party, for the purpose of securing compliance with this decree.

Article IX

Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this decree, or any other person, firm or corporation that may hereafter become bound thereby in whole or in part, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of this decree, and (2) for the enforcement of compliance therewith.

Article X

Judgment is entered against the defendant companies for 50% of the costs of $2824.00 to be taxed in this proceeding, and the costs so to be taxed are hereby prorated against the several defendant companies as follows:

[fol. 850] United States Gypsum Company	$776.60
National Gypsum Company	324.76
Certain-teed Products Corporation	155.32
The Celotex Corporation	42.36
Ebsary Gypsum Company, Inc.	42.36
Newark Plaster Company	56.48
Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company	14.12

Let the decree be entered.

By —— ——.

—— ——, 1951.

I hereby certify that the within is a true and correct copy of Preliminary Statement as filed with the District Court, March 6, 1951, and stipulated to by all counsel.

Hugh Lynch, Jr., Attorney for U. S. Gypsum Co.

[fol. 851] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 8017

UNITED STATES OF AMERICA, Plaintiff,

v.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM Company; Certain-Teed Products Corporation; The Celotex Corporation; Ebsary Gypsum Company, Inc.; Newark Plaster Company; Samuel M. Gloyd, Doing Business Under The Name of Texas Cement Plaster Company; Sewell L. Avery; Oliver M. Knode; Melvin H. Baker; Frederick G. Ebsary; and Frederick Tomkins, Defendants

PRELIMINARY STATEMENT AND FINAL DECREE—May 15, 1951

This cause came on for trial before this Court on November 15, 1943. At the conclusion of plaintiff's presentation of the case, defendants moved, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, for judgment dismissing the complaint on its merits. The motion of defendants was granted August 6, 1946. The judgment so rendered by this Court was reversed by the Supreme Court of the United States, and the case was remanded to this Court for further proceedings in conformity with the opinion of the Supreme Court (333 U. S. 364).

Following the remand, the plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, moved for summary judgment in its favor upon the pleadings and all of the proceedings which theretofore had been had in the [fol. 852] case, or, in the alternative, for such further proceedings as this Court might direct, and defendants, by direction of the Court, filed proffers of proof.

Argument by counsel for the respective parties upon the motion of plaintiff was heard by the Court, and after due consideration of such argument and of defendants'

proffers of proof, Garrett, J. and Jackson, J., constituting a majority of the Court, announced a ruling to the effect that plaintiff's motion for summary judgment would be granted, and Stephens, J., who presided during the trial, announced his dissent from such ruling.

Thereafter counsel for plaintiff and counsel for certain of the defendants submitted forms of final decrees for the consideration of the Court and also suggested findings of fact, the latter to be considered in the event the Court should deem it necessary to make any findings of fact additional to those originally found by it and to those stated in the opinion of the Supreme Court.

In due course, the Court heard arguments respecting the proposed decrees and the suggested findings of fact, and full consideration was given thereto and to all prior proceedings—all being considered in the light of the decision of the Supreme Court which, as understood by the majority of this Court, held that the defendants acted in concert to restrain trade and commerce in the gypsum board industry and monopolized said trade and commerce among the several states in that section hereinafter referred to as the eastern territory of the United States, which section embraces all the states of the United States westward from the eastern coast thereof to the Rocky Mountains and including New Mexico, Colorado, Wyoming, and the eastern half of Montana.

[fol. 853] Thereafter this Court, on November 7, 1949, entered its decree sustaining plaintiff's motion for summary judgment and granting relief which it deemed appropriate to its adjudication. Plaintiff thereupon appealed to the Supreme Court seeking to have the scope of the relief enlarged, and certain defendants appealed to the Supreme Court for a reversal of the judgment, which latter appeal was dismissed by the Supreme Court on May 29, 1950. On November 27, 1950, the Supreme Court rendered an opinion on the plaintiff's appeal, affirming this Court's adjudication of Sherman Act violation, holding there was concerted action through the fixed-price licenses and accepting as true the underlying facts in the defendants' proof by proffer. Nevertheless, the Supreme Court reversed the decree heretofore entered herein and

remanded the cause to this Court with ins ructions to modify its decree and for further proceedings in conformity with its opinion.

Upon remand, this Court, after ordering counsel for the plaintiff and for the defense to submit forms of decree in conformity with the Supreme Court opinion and after considering such forms has modified its decree of November 7, 1949, in accordance with the Supreme Court's opinion of November 27, 1950.

DECREE

It is therefore ordered, adjudged and decreed:

Article I

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states a cause of action against defendants under the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Com- [fol. 854] merce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Antitrust Act, and acts amendatory thereof and supplemental thereto.

Article II

As used in this decree:

1. "Defendant companies" shall mean all of the corporate defendants and Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company.

2. "Gypsum board" shall mean plaster board, lath, wallboard, special surface board, sheathing, liner board (including any such product which is perforated or metallized) made from gypsum.

3. "Gypsum products" shall mean gypsum board as defined in the preceding paragraph, and plaster, block, tile and Keene's cement made from gypsum.

4. "Patents" shall mean United States Letters Patent and applications for United States Letters Patent relating to gypsum board, its processes, methods of manufacture or use, now owned or controlled by defendant United States Gypsum Company and issued to, applied for or acquired by defendant United States Gypsum Com-

pany within a period of five (5) years from the date of this decree, including Letters Patent issued upon any of said applications, and continuations in whole or in part, renewals, reissues, divisions and extensions of any such Letters Patent or applications for Letters Patent.

5. "Patent Licenses" shall mean the patent license agreements which were in effect between defendant United States Gypsum Company and each of the other defendant companies at the time the complaint herein was filed and described in said complaint as follows:

[fol. 855] Agreement dated October 15, 1929, between United States Gypsum Company, as licensor, and Certain-teed Products Corporations, as licensee;

Agreement dated October 17, 1929, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee;

Agreement dated October 18, 1929, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee;

Agreement dated November 5, 1929, between United States Gypsum Company, as licensor, and Universal Gypsum and Lime Company (National Gypsum Company, as Assignee), as licensee;

Agreement dated November 25, 1929, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee;

Agreement dated April 23, 1930, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Co., as Assignee), licensee;

Agreement dated February 10, 1937, between United States Gypsum Company, as licensor, and Texas Cement Plaster Company, as licensee;

Agreement dated October 5, 1934, between United States Gypsum Company, as licensor, and National Gypsum Company, as licensee (Metallized board);

Agreement dated October 12, 1934, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Metallized board);

Agreement dated November 2, 1934, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Metallized board);

Agreement dated December 4, 1934, between United States Gypsum Company, as licensor, and American Gypsum Company (The Celotex Corporation, as Assignee), as licensee (Metallized board);

Agreement dated August 14, 1935, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Metallized Board);

Agreement dated June 8, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee (Perforated lath);

[fol. 856] Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as Licensee (Perforated lath);

Agreement dated February 2, 1937, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated September 16, 1938, between United States Gypsum Company, as licensor, and Ebsary Gypsum Company, as licensee (Perforated lath);

Agreement dated June 23, 1937, between United States Gypsum Company, as licensor, and Kelley Plasterboard Company (Newark Plaster Company, as Assignee), as licensee (Perforated lath);

Agreement dated January 3, 1939, between United States Gypsum Company, as licensor, and Newark Plaster Company, as licensee (Perforated lath);

and any supplement or amendment to any of said patent license agreements.

Article III

The defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board and have

monopolized trade and commerce in the gypsum board industry in violation of sections 1 and 2 of the Sherman Anti-trust Act.

Article IV

Each of the license agreements listed in Article II hereof is adjudged unlawful under the anti-trust laws of the United States and illegal, null and void.

Article V

The defendant companies, and their respective officers, directors, agents, employees, representatives, subsidiaries, and any person acting or claiming to act under, through or for them, or any of them, be and each of them hereby is enjoined from entering into or performing any agree-[fol. 857] ment or understanding among the defendant companies or other manufacturers of gypsum products to fix, maintain or stabilize, by patent license agreements or other acts or course of action, the prices, or the terms or conditions of sale, of gypsum products sold or offered for sale to other persons, in or affecting interstate commerce; and from engaging in, pursuant to such an agreement or understanding, any of the following acts or practices:

(1) agreeing upon any basis for the selection or classification of purchasers of gypsum products;

(2) refraining from selling gypsum products to any purchaser or any class of purchasers;

(3) agreeing upon any plan of selling or quoting gypsum products at prices calculated or determined pursuant to a delivered price plan which results in identical prices or price quotations at given points of sales or quotation by defendants using such plan;

(4) policing, investigating, checking or inquiring into the prices, quantities, terms or conditions of any offer to sell or sale of gypsum products.

Article VI

1. Defendant United States Gypsum Company is hereby ordered and directed to grant to each applicant making application therefor, but only in so far as it has the right

to do so, a non-exclusive license to make, use and vend under any, some or all patents as hereinbefore defined, at a reasonable, non-discriminatory royalty or royalties there- [fol. 858] for. Defendant United States Gypsum Company is hereby enjoined from making any sale or other disposition of any of said patents which deprives it of the power or authority to grant such licenses unless it requires as a condition of such sale, transfer or assignment that the purchaser, transferee or assignee shall observe the requirements of Articles VI and VIII of this decree, and unless the purchaser, transferee or assignee shall file with this Court, prior to or as a part of the consummation of said transaction, an undertaking to be bound by said articles of this decree.

2. Defendant United States Gypsum Company is hereby enjoined from including any restriction or condition whatsoever in any license or sublicense granted by it pursuant to the provisions of this article, except that (a) the license may be indivisible and non-transferable; (b) a reasonable, non-discriminatory royalty may be charged, which royalty may not be imposed upon or measured by patent-free products, processes or uses; (c) provision may be made requiring licensee to keep full and accurate records of the gypsum board manufactured and sold by it under any such patent and requiring licensee to make appropriate reports to licensor as to the royalty due, but such reports shall not disclose the selling price of the board or disclose a breakdown of the size or thickness of the board sold; (d) reasonable provision may be made for periodic inspection of the books and records of the licensee by an independent auditor, or by any person acceptable to the licensor and licensee, who shall report to the licensor only the amount of royalty due and payable; (e) reasonable provision may be made for marking the gypsum board manufactured or sold under the licensed patent; and (f) [fol. 859] reasonable provision may be made for cancellation of the license upon failure of the licensee to pay the royalty or to permit the inspection of its books and records or for other material breach of the terms of the license agreement by licensee, or in the event licensee shall be adjudged a bankrupt. The license agreement

shall be in writing signed by the parties thereto and shall to the extent that licensor has the right to do so, grant to the licensee the full right to make, use and vend the inventions and improvements described in the claims of each patent licensed, in the manufacture, sale or use of gypsum board, for the full term of the patent and any renewal, reissue, division, or extension thereof, and may contain the provisions hereinabove set forth and such other lawful provisions as may be agreed upon between the parties thereto and which are not in conflict with any of the provisions of this decree.

3. Upon receipt of written request for such a license defendant United States Gypsum Company shall advise the applicant in writing of the royalty which it deems reasonable for the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within sixty (60) days from the date such request for a license was received by United States Gypsum Company, the applicant therefor shall within ten (10) days thereafter apply to this court for a determination of a reasonable royalty or be deemed to have abandoned his said request for such license. The applicant shall promptly give written notice of the filing of such application to the United States Gypsum Company and to the Attorney Gen- [fol. 860] eral of the United States, who shall have the right to be heard thereon. The reasonable royalty rate or rates so determined by the court shall apply to such patent or patents in the license of the applicant from the date of his last written request for such license, and to such patent or patents in all other licenses then or thereafter issued under this decree from the date of such determination. Pending the completion of any such proceeding, applicant shall have the right to make, use and vend under the patent or patents to which his application pertains upon the terms and conditions as set forth in paragraph 4 of this article, provided he files his application for the determination of a reasonable royalty as aforesaid.

4. Where an application has been made to this Court for the determination of a reasonable royalty under paragraph 3 of this Article, the applicant or the United States Gypsum Company may apply to the court to fix an interim

royalty rate pending final determination of what constitutes a reasonable royalty. If the court fixes such interim royalty rate, United States Gypsum Company shall then issue and the applicant shall accept an interim license agreement effective as of the date of the applicant's last written request for such license hereunder and in the form this day filed herein and approved by the court, providing for the periodic payment of royalties at such interim rate from the effective date of such interim license. If applicant fails to accept such interim license or fails to pay the interim royalty in accordance therewith, any such action or omission shall be grounds for the dismissal of the application for the determination of a reasonable royalty and the withdrawal or cancellation of [fol. 861] the interim license. Where an interim license has been issued pursuant to this paragraph, reasonable royalty rates for any patent or patents as finally determined by the court shall apply to such patent or patents in the licenses of the applicant and all other applications then before the court and shall be retroactive with respect to each such applicant to the date of his said written request for such license.

Article VII

Nothing contained in this decree shall be deemed to have any effect upon the operations or activities of said defendants which are authorized or permitted by the Act of Congress of April 10, 1918, commonly called the Webb-Pomerene Act, or the Act of Congress of August 17, 1937, commonly called the Miller-Tydings Act, or by any present or future act of Congress or amendment thereto; provided, however, nothing contained in this Article shall in any manner affect the provisions of Article VI of this decree.

Article VIII

For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice, upon written request of the Attorney General or any Assistant Attorney General, and on reasonable notice in writing addressed to any defendant

company at its principal office, shall be permitted, subject to any legally recognized privilege: (a) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in its possession or under its control re-
[fol. 862] lating to any of the matters contained in this judgment; (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant regarding any of the matters contained in this judgment; provided, however, that either said defendant or any such officer or employee may have counsel present at any such interview. No information obtained by the means permitted in this Article shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the United States of America is a party, for the purpose of securing compliance with this decree or as otherwise required by law.

Article IX

Judgment is entered against the defendant companies for 50% of the costs of $2824.00 to be taxed in this proceeding, and the costs so to be taxed are hereby prorated against the several defendant companies as follows:

United States Gypsum Company	$776.60
National Gypsum Company	324.76
Certain-teed Products Corporation	155.32
The Celotex Corporation	42.36
Ebsary Gypsum Company, Inc.	42.36
Newark Plaster Company	56.48
Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company	14.12

[fol. 863]

Article X

Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this decree, or any other person, firm or corporation that may hereafter become bound thereby

in whole or in part, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of this decree, and (2) for the enforcement of compliance therewith.

Let the decree be entered.

Harold M. Stephens, Finis J. Garrett, Joseph R. Jackson.

May 15, 1951.

[fol. 864] INTERIM LICENSE

This agreement, made this —— day of ——, A.D. ——, by and between United States Gypsum Company, an Illinois corporation, of Chicago, Illinois, hereinafter referred to as Licensor, and ——, a —— corporation, of ——, hereinafter referred to as Licensee,

Witnesseth, That

Whereas, Licensee desires to obtain a license to make, use and sell gypsum board made according to the processes or embodying the claims of one or more of the hereinafter mentioned patents, owned by Licensor, through the full term thereof;

Now, therefore, in consideration of the sum of One Dollar and other good and valuable considerations, the receipt whereof is hereby acknowledged, and of the mutual covenants and agreements hereinafter contained, the parties hereto have agreed as follows, to wit:

1. Licensor has agreed to and does hereby give and grant unto Licensee an indivisible and non-exclusive right, license, and privilege to make, use and vend the inventions and improvements claimed in the following letters patent:

Patent Number	*Date*	*Expiration Date*
——	——	——

[fol. 865] in the manufacture, use or sale of gypsum board, in the United States of America and the territories and possessions thereof, for the full term of the last to expire of said letters patent, including any reissues thereof.

2. Licensee agrees to pay to Licensor for the right and privilege granted under Paragraph 1 above a license fee or royalty at the rate of —— per cent (——%) of Licensee's selling price of all gypsum board manufactured under any of the processes or embodying any of the inventions covered by said patents and sold by it during the term hereof, provided that no license fee or royalty shall be payable on gypsum board exported by Licensee to any foreign country. Nothing herein contained shall prevent Licensee from selling any of said gypsum board in any foreign country.

Licensee's selling price for the purpose of computing the royalty shall mean the net price at Licensee's shipping point after deducting transportation charges and cash discounts allowed by Licensee.

3. The License herein granted shall be personal to the Licensee and shall not be sold, assigned or transferred by it either voluntarily or by operation of law without the written consent of Licensor.

4. Licensee agrees to keep separate, full and accurate books of accounts and records showing the exact quantity of all gypsum board manufactured under any of the processes or embodying any of the inventions covered by said patents and sold by it, together with the Licensee's selling price thereof, and agrees that on or before the 20th day of each calendar month it will deliver to Licensor at its office in Chicago, Illinois, true written returns, verified under [fol. 866] oath by an officer or other authorized agent of Licensee, setting forth, without any breakdown with respect to thickness and size of gypsum board, the quantity of all such gypsum board manufactured by it, and sold during the preceding calendar month, and the amount of royalty due and payable on account of such gypsum board so manufactured and sold. Licensee also agrees to pay to Licensor at its said office on or before the 20th day of each calendar month the hereinbefore stipulated royalties or license fees which may then be due under the terms of this agreement on account of all such gypsum board manufactured by it and sold during the preceding calendar month.

5. Licensor shall have the right, at all reasonable times and for such period or periods of time as it may from time to time determine, to verify the correctness of the royalty

payments by periodic inspection of the accounts and records of Licensee referred to in the next preceding paragraph, provided, however, that such inspection shall be made by an independent auditor, or by any other person acceptable to both Licensor and Licensee, who shall report to Licensor only the amount of the royalties which were payable during the period covered by the inspection. If Licensee shall object to the independent auditor selected by Licensor, then Licensor shall name, in writing addressed to Licensee, three certified public accountants of good standing, not directly or indirectly employed by it or in any other manner connected with it, and if Licensee shall not within ten days thereafter accept in writing any one of them, then Licensor shall have the right to designate one of the three to act as the independent auditor. In any event, the expense of making any such audit shall be borne equally by the parties.

[fol. 867] 6. Licensee agrees that all gypsum board manufactured and sold by it under or embodying the claims of any of such patents shall be distinctly marked with the word "Patent" followed by the numbers of any of the aforesaid patents, the claims of which are embodied in said gypsum board, and Licensee further agrees to distinctly mark said gypsum board with the words "Licensed under the above patents and also under the process claims of patent," followed by the number of any of the aforesaid patents of which any process claimed therein is utilized in the manufacture of said product.

7. In the event either party shall at any time neglect, fail or refuse to keep or perform any of the conditions or agreements to be kept or performed by it under the provisions hereof, then the other party may at its election serve upon the party in default written notice of intention to terminate this license and specifying the alleged default. If the party in default shall not cure the defaults so specified within thirty (30) days thereafter, then the other party may cancel and terminate this agreement by serving upon the party in default written notice of its election so to do. In the event the Licensee shall at any time be adjudicated a bankrupt, then the license hereunder shall immediately be and become cancelled and terminated. Neither party, by

any such cancellation or termination, shall be relieved from any liability accrued at the time thereof.

8. Any notice required or permitted to be served by either party upon the other under the terms hereof, may be served by mailing the same to the other party, postage prepaid and registered, addressed to such other party at its last [fol. 868] known principal office, and the deposit of such notice in the United States mails, postage prepaid and so addressed, shall constitute service of notice hereunder.

9. In case Licensor shall grant to any other person any license under the aforesaid patents for the manufacture, sale or use of gypsum board made by use of the processes or embodying the claims or inventions claimed in any of said patents, or shall grant any rights under any such license, upon terms more favorable than those granted hereunder to this Licensee, then it will grant to this Licensee a license on the same terms or extend to it the same right granted to any such other person.

10. This Agreement shall be effective as of the —— day of ——.

In witness whereof the parties hereto have caused these presents to be signed in duplicate by their respective presidents, attested by their respective secretaries, and their corporate seal to be hereunto affixed, the day and year first above written.

United States Gypsum Company, By —— ——, President.

Attest: —— ——, Secretary.

—— ——, President.

Attest: —— ——, Secretary.

[fol. 869] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Holding a Three Judge Court

Civil Action No. 8017

UNITED STATES OF AMERICA, Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM Company; Certain-teed Products Corporation; The Celotex Corporation; Ebsary Gypsum Company, Inc.; Newark Plaster Company; Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company; Sewell L. Avery; Oliver M. Knode; Melvin H. Baker; Henry J. Hartley; Frederick G. Ebsary; and Frederick Tomkins, Defendants

Reporter's Transcript of Hearings on Proposed Final Decree of May 15, 1951

Court Room,

U.S. Court of Customs and Patent Appeals,
Washington, D. C.

Tuesday, May 15, 1951

Hearing upon proposed final decree to be modified in accordance with the directions of the Supreme Court, in the above-entitled case, convened at 10:00 a.m., pursuant to notice, before Honorable Harold M. Stephens, Honorable Finis J. Garrett, and Honorable Joseph R. Jackson, sitting as the District Court of the United States for the District of Columbia.

[fol. 870] APPEARANCES:

Roscoe T. Steffen, Esq., and Edward Knuff, Esq., Special Assistants to the Attorney General, for plaintiff.

Cranston Spray, Esq., and Hugh Lynch, Esq., for the

defendants United States Gypsum Company, Sewell L. Avery, and Oliver M. Knode;

Elmer E. Finck, Esq., for the defendants National Gypsum Company and Melvin H. Baker;

Norman Miller, Esq., for the defendant Certain-Teed Products Corporation; and

Ralph Wanless and Walter G. Moyle, for the defendants The Celotex Corporation.

[fol. 871] COLLOQUY BETWEEN COURT AND COUNSEL

Chief Judge Stephens: The court is sitting today in the matter of United States against United States Gypsum Company, et al., and will hear counsel with reference to the proposed final decree to be modified in accordance with the directions of the Supreme Court.

We will be glad to hear from you. Who wishes to proceed, the Government or defendants' counsel.

Mr. Knuff: May it please the court, before we take up the question of the final decree, I have a motion that I would like to present under Rule 41(a), and that is that I now move the court to dismiss the complaint as to Mr. Henry J. Hartley.

We do not think that there is sufficient evidence in the case to connect Mr. Hartley. In our brief to the Supreme Court we told the Supreme Court that on the remand of this case, if the case was remanded, that we would move to dismiss Mr. Hartley before any final decree was entered.

I now make that motion.

Chief Judge Stephens: The case may be dismissed then, as to Mr. Hartley.

Mr. Spray: May it please the court, I have been requested by my colleague, Bruce Bromley, to advise the court that he is in trial of a law suit in New York which has been carrying on for some days, and gives promise of carrying on for some days in the future.

[fol. 872] His application to the court for a recess today so that he might be here was denied, a fact which he sincerely regrets, and he wanted me to let the court know why he is not here.

I shall not, of course, presume to take his place, but in his absence I would like to present on behalf of the

United States Gypsum Company a revised form of decree and a form of interim license agreement, which is to be considered by the court in lieu of the form of decree and form of license agreements that this defendant submitted last March 6th.

We would like to ask that this be substituted for the prior form which we presented. This revised form of decree has been filed with the court. He has the original, and I believe that the copies have been furnished to the court.

It is in mimeographed form, but it is a word for word reproduction of the form of revised decree and the form of interim license which was served upon all parties to this case on May 5, and I believe copies also were furnished to the judges of this court.

When the second decision of the Supreme Court came down, we felt that certainly we had reached a point here where it was incumbent upon counsel to get together and see if we could not iron out our differences with respect to the decretal provisions, and thus try to save, in so far as possible, the time of this court in trying to resolve those differences.

Last March there were four forms of decree filed with [fol. 873] the court for consideration, one by the Government, one by the defendant United States Gypsum Company, one by the defendant Certain-Teed, and one by the defendant National.

Our negotiations with the defendants' counsel and with the Government's counsel continued, and in the light of those negotiations we have revised this form of decree which we are submitting this morning, and which we are hopeful may be considered by the court in the absence of any disagreement or objections from the other parties.

Needless to say, this is not a consent decree or even an agreed decree. Our position——

Chief Judge Stephens: You say it is or is not?

Mr. Spray: Is not.

Our position is pretty well understood by this court, I believe. We, of course, felt that the disposition that this court made in 1946 was a proper disposition of the case, but the Supreme Court held otherwise.

If summary judgment was to be entered, we felt that the form of decree which was entered by this court on November 7, 1949, was a fair and proper decree, giving all the remedy that the plaintiff was entitled to.

But again, the Supreme Court has felt otherwise, and has indicated there should be some revisions of that decree. The revised form of decree which we are submitting today is one which we feel meets all requirements of the Supreme [fol. 874] Court decision, and which we feel, in the light of that decision, is as fair and equitable a decree as can be entered under the circumstances in this case.

We therefore submit it. I am prepared, if the court should desire it, to leaf down through this and briefly state what it has done, but all parties have copies of it and the court has had copies of it, and I do not care to trespass upon the time of the court, if it is unnecessary.

Chief Judge Stephens: Well, we may wish to ask you some questions about it later.

Mr. Spray: Very well.

Chief Judge Stephens: Is there anything to be said by any of the other defendants' counsel?

Mr. Miller: May it please the court, on behalf of Certain-Teed Products Corporation, I wish to state that after the filing of the proposed decree which we filed in March with this court, there were continued negotiations, both between ourselves and counsel for United States Gypsum and the Government.

As a result of those negotiations the revised decree to which Mr. Spray has referred was submitted to us, and was, we believe, drafted.

We wish now to state to the court the objections that we had to the first decree submitted both by United States Gypsum are now removed, and we would like leave now to withdraw the decree which we have filed with this court, [fol. 875] and state to the court that we are in agreement with the decree proposed and filed by United States Gypsum.

Chief Judge Stephens: You may have leave to withdraw your previously filed proposed decree, and your agreement with this may be recorded.

May we hear from National? Mr. Finck.

Mr. Finck: If the court please, on behalf of National Gypsum Company, we also approve this revised form of decree as amended. I do not think it is necessary to withdraw any decree or proposed decree which we filed, so I will just approve it as presented.

Chief Judge Stephens: Is Celotex represented?

Mr. Wanless: On behalf of The Celotex Corporation, we state to the court that we have no objection to the form of decree proposed now by the United States Gypsum Company.

Chief Judge Stephens: Is there anyone here representing Ebsary?

Newark Plaster?

Samuel M. Gloyd, Texas Cement Plaster Company?

Mr. Spray, I presume that you represent Mr. Avery?

Mr. Spray: Yes, sir, Sewell L. Avery and Oliver M. Knode.

Chief Judge Stephens: Who represents Mr. Baker?

Mr. Finck: I represent him.

Chief Judge Stephens: Is there anyone here representing Frederick G. Ebsary?

[fol. 876] Or Frederick Tomkins?

Have you had any communication with counsel for the defendants who are not represented this morning, Mr. Spray? Do you know whether they agree with this decree or not?

Mr. Spray: I have had correspondence from Mr. Johnston, counsel for the Texas Cement Plaster Company, following the furnishing of the first form of decree which we presented, in which he said that it was quite unsatisfactory to his client.

Copies of these other forms of decree have been sent to the attorneys for Newark and for Ebsary, but I have had no communication one way or the other from them.

Chief Judge Stephens: The clerk sent notices to counsel for each of the defendants?

Mr. Spray: That is my understanding.

Chief Judge Stephens: Mr. Steffen or Mr. Knuff.

Mr. Knuff: May it please the court, I have gone over the proposed decree that was submitted here this morning, and the Government has no objection to its entry, if it is satisfactory to the court.

Chief Judge Stephens: Mr. Steffen.

Mr. Steffen: We had one or two questions we would like to ask counsel about the decree.

Judge Garrett: I would like to be sure that I have the right copy before me.

Chief Judge Stephens: These copies that were laid on our [fol. 877] desk, I assume, are true copies of the decree?

Mr. Spray: That is correct.

Judge Garrett: Copies were sent to us, of course. Are these exact replicas of those that came to our office?

Mr. Spray: They are, exactly, sir, in mimeographed form as distinguished from the ditto form.

Judge Garrett: That is all that I wanted to know. All right.

Chief Judge Stephens: There are one or two minor points on page three. The second paragraph reads:

"Upon remand, this court, after ordering counsel for the plaintiff and for the defense to submit forms of decree in conformity with the Supreme Court opinion and after hearing arguments of the respective parties with respect thereto,—"

That clause, "after hearing arguments of the respective parties with respect thereto" ought to be stricken out, I suppose. We have heard no arguments, and unless we have some this morning we probably will not hear any.

I think that should read, "and after considering the same."

We have considered the previously proposed decree, each of us has read them and reread the present proposed decree carefully, but we actually have not had arguments on them.

I should suggest that that be changed to read: "for the defense to submit forms of decree in conformity with the Supreme Court opinion and after considering the same [fol. 878] as modified—", and so forth.

Mr. Spray: Yes, sir. I think the other form was in contemplation of a hearing which we knew the court was going to have on which we anticipated there might be arguments, but that has been eliminated.

Chief Judge Stephens: Now, the next question involves the royalty provision on pages 9, 10 and 11.

Paragraph 3 on page 9, and paragraph 4 on page 10 and 11, appear to provide in the event of disagreement or inability to agree upon a royalty under the licenses which have been issued, application may be made to the court to fix either final royalty or interim royalty.

We have two questions about that. One is whether this court can, by virtue of an agreement between counsel parties to these decrees, fix royalties. Have we any jurisdiction to fix royalties? We have jurisdiction, undoubtedly we can retain jurisdiction and do, in the last paragraph, to enforce and interpret and apply, but it occurred to us that there might be some doubt as to whether the court has any jurisdiction to fix royalties for parties simply conferred upon itself by a decree which apparently all parties have agreed to.

What has been the practice of the United States District Courts heretofore in this situation, if you know, Mr. Knuff or Mr. Steffen? Have the courts issued decrees retaining for themselves powers to fix royalties where there has been [fol. 879] disagreement?

Mr. Knuff: Yes, they did that in the Hartford Empire case, and as I recall it, in the National Lead case that was specifically reserved in Judge Rifkind's decree in that case.

There are other cases. The Lime Materials case, I think is comparable, and I am quite sure there are quite a number of cases on it, Your Honor.

This practice envisioned in paragraph 3 is the usual recognized practice that the Department has followed with reference to compulsory licenses.

Judge Jackson: When it says "this court", does it mean the District Court or does it mean this particular three-man court?

Mr. Knuff: The practice has been, sir, to apply to this present court.

Judge Jackson: Suppose this present court would not have its personnel sometime when there is a disagreement, what then?

Mr. Knuff: Well, we had that situation, I think, in—well, I was going to say that we had that situation in another case, but that is not quite true.

I suppose that in case one of the members of this court were to die, or to be incapacitated, there would be another member appointed to take the vacating member's place. The practice has been to have the present court pass upon the matters in the decree.

[fol. 880] Judge Jackson: It is not any judge of the District, it is just the particular judge or the particular personnel.

Mr. Knuff: The practice has been the present personnel.

Chief Judge Stephens: That would seem to be a suitable practice, from the standpoint of convenience, because we would have more information concerning the case than a judge that was new to it.

Judge Jackson: Oh, surely.

Chief Judge Stephens: But it occurred to us that in view of the uncertainty of life, and the running of time, that it may be safer for the defendants and the Government, both, to provide in the decree that application be made to the United States District Court for the District of Columbia, rather than just to this court, because this court may not outlive the decree.

Mr. Knuff: Well, I would be glad to canvass the situation with Mr. Spray and see if we can make it in the alternative.

Chief Judge Stephens: Another question I wanted to explore somewhat is the burdens which the members of this court have in their respective offices. What has been the practice under these royalty-fixing decrees in the past? Has much litigation arisen from them? Is it likely to occupy the attention of the court much in settling disagreements as to royalties?

Mr. Knuff: No, there has not been a good deal of that. There has not been a great deal of calling upon the court to [fol. 881] fix the royalties. I do not recall of another case, other than the Hartford Empire, where the court has ever been called upon to fix the royalties.

Now, there may be one, but I don't recall.

Mr. Miller: Your Honor, there was the American Optical case very recently where the court was called upon to fix royalties.

Chief Judge Stephens: What sort of a proceeding was it, the calling of expert witnesses to testify as to the reasonableness of rates?

Mr. Miller: In that case it was reference to the master to take testimony.

Mr. Knuff: I was not familiar with that case.

Mr. Miller: There was quite a voluminous record made in the case.

Chief Judge Stephens: How long did it take?

Mr. Miller: Well, it was disposed of in the District Court. It did not go any further than that, but there was a record of over 1,000 pages, if I am not mistaken. But there were some questions there which, to my mind, would not occur in the situation you have in this case.

There were a large number of patents covering the field of arms and curvatures and temples for eyeglasses, and that kind of question would not be present in this present case.

But there was a reference to a master and expert testi- [fol. 882] mony was taken.

Chief Judge Stephens: Does counsel for either the Government or defendants have any idea how many licenses are likely to be issued by the Gypsum Company under that noncompulsory provision?

Mr. Spray: I could not state. Of course, I do know that of the patents which have heretofore been licensed, they have all expired, except the three Roos patents, and one of the metallized board patents, so that actually of what has heretofore been licensed, there are only those four patents still outstanding.

Now, there are some other patents, but whether or not there would be interest in taking license under them, I would not know. I certainly would not expect it to be voluminous.

Chief Judge Stephens: You would not expect it to be voluminous?

Mr. Spray: No, sir.

Chief Judge Stephens: Do you anticipate difficulties in agreement upon royalties for the defendants?

Mr. Spray: We do not see why there should be, and I would certainly say that I would hope there would not

be, but that is a matter which we have not fully explored, of course.

Mr. Finck: Your Honor, may I be heard?

Chief Judge Stephens: Mr. Finck.

Mr. Finck: If the court please, in all fairness to this [fol. 883] Court, I believe that there may be a hearing on the royalties for the Roos patents, because some of us believe that the royalty should be less than one per cent, and I think that Mr. MacLeish and counsel for United States Gypsum feel that it should be one per cent, so that we may have a hearing on that subject, I believe.

Mr. Spray: That being a royalty that has been determined by the parties acting at arm's length, and having been paid over all these years, I did not contemplate we would have much difficulty in arriving at a reasonable royalty for the Roos patents, but I hear what Mr. Finck says, and we will have to meet with him on that.

Chief Judge Stephens: When would such a hearing be likely to arise?

Mr. Finck: I suppose if such a hearing were to arise it would be within the next sixty days. We might be able to get together, of course, but we have not tried. It is my understanding that they feel very definite on the royalty, and we also feel very definite about it.

Chief Judge Stephens: Well, this royalty provision concerns us some, not because we wish to avoid our duty, we do not wish to avoid it, but we realize that the present members of this court are much better informed concerning the case than any new judge could be, without a great deal of expenditure of time and labor on his part to get acquainted [fol. 884] with the record, but we are concerned over the not impossible and perhaps not even improbable change in personnel of the court. Two of the judges have reached retirement age already, and it occurred to us that it might be better for both the Government and the defendants to put in at least an alternative provision that the royalty could either be fixed by this court, or upon application to any United States District Judge in the District of Columbia, or the court has jurisdiction in case of the unavailability of the present tribunal.

We have never had to meet the question of whether or not you can shift cases in the middle of a case. Judge

Bland, who was in this case at the beginning, dropped out just before the preliminary proceedings of a procedural character were terminated, so when Judge Jackson joined the court the trial commenced with the present complement.

If one judge should retire or die or become unavailable through illness or otherwise, whether that could be treated as the same court or not, I don't know.

Judge Jackson: He could be designated under retirement.

Chief Judge Stephens: The other question we have in mind is whether or not it would not be wise for you to check through with us the provisions of the requirements of the Supreme Court opinion with respect to modification, and show us where in the decree those requirements have been met.

We have all read the decree. I have read it twice, and I [fol. 885] think my brothers have also. But I have underlined each of the requirements made by the Supreme Court, and I might refer to those.

Mr. Spray: If you will do that, I will try to refer to the decree.

Chief Judge Stephens: On page 11 of the Supreme Court opinion of November 27, 1950, in the middle of the page, it states:

"There is one change acceptable to the Government and United States Gypsum and which we think desirable. Article II, Section 3 of the decree defines gypsum board as 'made from gypsum and embodying any of the inventions or improvements set forth and claimed in any of the Patents.' This is too restrictive, and the words 'and embodying any of the inventions or improvements set forth and claimed in any *of* the Patents' should be stricken, if the definition is used."

Mr. Spray: If the court will turn to page 4 of the revised draft, Article II, Section 4, you will find that that language is completely deleted from the definition of "Patents".

Chief Judge Stephens: What page?

Mr. Spray: Page 4, Article II, Section 4.

Chief Judge Stephens: I wonder if I have the right document? Page 4, Article II?

Mr. Spray: Yes, the definition of the term "Patents".

Chief Judge Stephens: Under subparagraph 4?

[fol. 886] Mr. Spray: That is right.

Chief Judge Stephens: In other words, you say there patents relating to gypsum board?

Mr. Spray: That is correct.

Chief Judge Stephens: It reads, "its processes, methods of manufacture or use," and it does not say "embodying any of the inventions or improvements set forth and claimed in any of the Patents"?

Mr. Spray: That is right.

Chief Judge Stephens: The reference in the Supreme Court opinion is not to patents but to the definition of gypsum board?

Mr. Spray: It seems to me that it came up in the definition.

Chief Judge Stephens: Not to the definition of patents.

Mr. Spray: But further I should have also referred the court to Section 2 of Article II on page 4, which is your definition of gypsum board, and you will see that there it is defined as meaning "plaster board, lath, wallboard, special surface board, sheathing, liner board (including any such product which is perforated or metallized) made from gypsum."

There is no reference made to the qualifying language contained in page 11 of the opinion of the Supreme Court.

Chief Judge Stephens: Now, the next one is on page 11 at the bottom it reads:

"The Government accepts the finding of Article III of [fol. 887] the decree but objects to Article V (2) and (3) because read together they allow agreements through price fixing by license between the United States Gypsum and Pacific Coast licensees. The complaint of Sherman Act violation was restricted to the eastern territory of the United States. The evidence applied only to that area. However, the close similarity between interstate commerce violations of the Sherman Act in eastern territory and western territory seems sufficient to justify the enlargement of the geographical scope of the decree to include all interstate commerce."

I believe in reading this decree I noticed that you have eliminated reference to the "eastern territory", except foreign commerce, I believe you exclude that, do you not?

Mr. Spray: There is an exception in Article VII, in so far as foreign commerce is concerned, that would be excluded under the provisions of the Webb-Pomerene Act.

Chief Judge Stephens: But otherwise it is unrestricted?

Mr. Spray: The only reference to the eastern territory in the decree is in Article III, where it is adjudicated that:

"The defendant companies have acted in concert in restraint of trade and commerce among the several states in the eastern territory of the United States to fix, maintain and control the prices of gypsum board."

That is the same language which was in this court's decree of November 7, 1949, and which the Supreme Court ex- [fol. 888] pressly affirmed on May 29.

But if you will turn to Article V you will see that all reference limiting this to the eastern territory has been deleted.

Chief Judge Stephens: Yes.

Now, the next is at the bottom of the main paragraph, in the middle paragraph on page 12. It is paragraph (c), and it reads:

"The Government asks an extension of the decree to include all gypsum products instead of patented gypsum board alone. * * * The license agreements, as indicated above, required royalties on unpatented open edge gypsum board. Board Survey, the organization created to enforce the license agreements, found possibilities of price evasion to exist by a licensee's cutting prevailing prices on other commodities, sold in conjunction with patented gypsum board. Bulletins issued to standardize sale practices, criticized rebates as violative of the license agreements. 333 U. S. 364,386. Defendants' offer of proof did not deny such effort to systematize sales. Their explanation was that the efforts were to enforce ligitimate license agreements and were not calculated steps in conspiracy or monopoly. We think the Government's request that the decree's injunctions reach gypsum products, as defined in its proposed decree, is reasonable and should be allowed."

Mr. Spray: In reply to that, Your Honor, I would call [fol. 889] the court's attention to page 4 of the suggested decree, Article II, subsection 3.

There has been included, which was not included in this court's prior judgment, a definition of the word "gypsum products", as meaning "gypsum board as defined in the preceding paragraph, and plaster, block, pile and Keene's cement made from gypsum."

Then if you will turn to Article V on page 6, you will find that the injunctive provision against the defendants runs against any agreement or understanding among the defendant companies or other manufacturers of gypsum products to fix, maintain or stabilize, by patent license agreement or other acts or course of action, the prices, or the terms or conditions of sale, of gypsum products sold or offered for sale to other persons, in or affecting interstate commerce.

So that has extended that to gypsum products, and then referring to the injunction against:

"engaging in, pursuant to such an agreement or understanding, any of the following acts or practices."

Then you run down subparagraphs 1, 2, 3 and 4 and you will see that they refer to gypsum products.

Chief Judge Stephens: And the next is in topic (d) on page 12:

"The Government asks that the decree forbid standardization of trade practices through concerted agreement. [fol. 890] Our former Gypsum opinion, pages 382-83, gives a summary of the methods adopted. Another method of regulating sales was by special provision for certain classes of customers, jobbers and manufacturing distributors. See 333 U. S. at 397 and 399, n. 18. We think this would justify the Government's requests. Article V, Sections 3, 4 and 6."

What were those requests?

Mr. Spray: If you will refer to page 7, where we have just been looking in the decree, subparagraph 1 of Article V is the equivalent of this Section 3, or substantially the same as Section 3 of Article V of the Government's form of decree that they submitted to the Supreme Court.

Chief Judge Stephens: That is the one printed in the right-hand column in the appendix?

Mr. Spray: That is correct. You will find that on page——

Chief Judge Stephens: Yes, I see that on page 21.

Mr. Spray: On page 21, yes.

Chief Judge Stephens: And No. 4:

"Refraining from selling gypsum products to any purchaser or any class of purchasers."

Mr. Spray: That is subparagraph (2) of Article V.

Chief Judge Stephens: That is subparagraph (2) again. What about 6?

Mr. Spray: Six is subparagraph (4) of Article V.

Chief Judge Stephens: That reads:

[fol. 891] "policing, investigating, check or inquiring into the prices, quantities, terms or conditions of any offer to sell or sale of gypsum products."

Then the next one, on page 14:

"To avoid any possibility that an individual's meeting of competitors' prices would be construed as a contempt of the decree, we think proposed Article V (5) should read as follows:

" '5. Agreeing upon any plan of selling or quoting gypsum products at prices calculated or determined pursuant to a delivered price plan which results in identical prices or price quotations at given points of sales or quotation by defendants using such plan.' "

Mr. Spray: That had to do with the so-called basing point method of pricing.

Chief Judge Stephens: Where is that provision contained?

Mr. Spray: That is subparagraph (3) of Article V appearing in the middle of page 7.

Chief Judge Stephens: Oh, yes.

Mr. Spray: And it is a verbatim reproduction of the paragraph that was prepared and stated by the Supreme Court on page 14 of the slip opinion.

Chief Judge Stephens: And then on page 15 we find:

"We think that the United States Gypsum Company should be required to license all its patents in the gypsum products field to all applicants on equal terms. Whether [fol. 892] the term for compulsory licensing of new patents is to be five years, or for a longer period with the privilege to the appellees to move for a limitation for such new patents, as provided in the suggested decree, Article VI, Section 6, we leave to the District Court. That court should provide for its determination of a reasonable royalty either in each instance of failure to agree or by an approved form or by any other plan in its discretion."

That seems to answer my question with reference to the power of the court to fix royalties.

My Spray: Yes, I think so.

Chief Judge Stephens: The Supreme Court has apparently told us we shall do so.

What is this Article VI, Section 6, and explain to us a little more fully than you have the provisions for compulsory licensing and the provisions in the decree with respect to the term of the licenses?

Mr. Spray: The court will recall that in its judgment of November 7, 1949, there was a provision which was designed to give these licensees an opportunity to get perfectly lawful licenses under the patents which they had been operating under pursuant to the licenses that they had had.

The Government objected to that as being too limited. To that end it will be recalled they were given a period of 90 days to make application for their new licenses.

[fol. 893] The Government objected to that as too limited, and contended in the Supreme Court that the provision for compulsory licensing with reasonable royalty should apply, not only to the patents which had been used in the old license agreements which were being declared illegal, null and void, but that it should also apply to patents relating to gypsum board which United States Gypsum might acquire in the future.

That was the Government's position before the Supreme Court.

And the Supreme Court agreed that there should be a modification to extend that to the new patents relating to gypsum board that might be issued in the future.

Now, what we have done in Article VI is to provide that the defendant, United States Gypsum Company, "is hereby ordered and directed to grant to each applicant making application therefor, but only in so far as it has the right to do so, a non-exclusive license to make, use and vend under any, some or all patents as hereinbefore defined, at a reasonable, non-discriminatory royalty or royalties therefor."

Now, turning back to the definition of patents, as hereinbefore defined, we find that it means:

"United States Letters Patent and applications for United States Letters Patent relating to gypsum board, its processes, methods of manufacture or use, now owned or controlled by defendant United States Gypsum Company and issued to, applied for or acquired by defendant [fol. 894] United States Gypsum Company within a period of five years from the date of this decree, including Letters Patent issued upon any of said applications, and continuations in whole or in part, renewals, reissues, divisions and extensions of any such Letters Patent or applications for Letters Patent."

In other words, the Government had asked that we be required to grant compulsory licensing at reasonable royalties, under all our patents now owned or hereafter owned with the right in United States Gypsum Company to come before the court at the end of five years and seek to have that provision modified, so that it would no longer apply to any future patents.

The Supreme Court had said in its opinion very clearly that it left entirely to the judgment of this court whether that should be for a five-year term, which automatically expired, without troubling the court with further action, or whether it should accept the Government's suggestion of having this apply to all our patents, with the right in us to come in at the end of five years and seek to have the decree modified.

This proceeds upon the former plan of having this com-

pulsory licensing at reasonable royalties apply to all our patents which we now have or which we may acquire within the next five years, or patents which may be issued and applications which are filed within the next five years.

But then the decree operates automatically, and it is [fol. 895] free of any other compulsory licenses.

Chief Judge Stephens: The next is on page 16:

"We disapprove the Government's suggestion that the burden of establishing the reasonableness of the requested royalty should be placed upon Gypsum by the decree. We do not decide where the burden of proof of value lies or who has the duty to go forward with the evidence in any particular instance."

That is taken care of, I assume, by leaving it to the court to fix the royalty in the event of disagreement?

Mr. Spray: That is right. There is no condition about burden of proof which was in the form of decree which the Government gave to the Supreme Court.

Chief Judge Stephens: "We disapprove the Government's suggestion, contained in Article VI (5) that the decree shall not be taken as preventing an 'applicant' (we construe this as meaning licensee) attacking the patent or as importing value to it. We see no occasion for this unusual provision and think it should be entirely omitted."

That is omitted?

Mr. Spray: That is omitted, yes, Your Honor.

Chief Judge Stephens: Then it reads:

"We approve the Government's suggested provisions for inspection of licensees' books and reports to licensor, substantially as set out in proposed Article VI (2) (c)."

What about that?

[fol. 896] Mr. Spray: That, Your Honor, will be found on page 8 of the proposed decree, section 2 of Article VI, starting about 10 lines down from the top of page 8. There is a paragraph that reads:

"Defendant United States Gypsum Company is hereby enjoined from including any restriction or condition what-

soever in any license or sublicense granted by it pursuant to the provisions of this article, except that (a) the license may be indivisible and non-transferable; (b) a reasonable, non-discriminatory royalty may be charged, which royalty may not be imposed upon or measured by patent-free products, processes or uses; (c)"—and this is the one specifically—

"provision may be made requiring licensee to keep full and accurate records of the gypsum board manufactured and sold by it under any such patent and requiring licensee to make appropriate reports to licensor as to the royalty due, but such reports shall not disclose the selling price of the board or disclose a breakdown of the size or thickness of the board sold."

I am sorry, Your Honor, that is one which was included, which is not directed specifically to the question which the court raised, but rather it is (d) which I am about to read:

"reasonable provision may be made for periodic inspection of the books and records of the licensee by an independent auditor, or by any person acceptable to the licensor and licensee, who shall report to the licensor only the [fol. 897] amount of royalty due and payable."

Now, that is, in substance, the provision which was contained in the Government's form of decree that it submitted to the Supreme Court.

Chief Judge Stephens: On pages 22 and 23?

Mr. Spray: On pages 22 and 23, and specifically at the top of page 23.

Chief Judge Stephens: Yes.

Mr. Spray: This section 2, as the court will see, is geared upon that provision of the Government's decree which it submitted here in March, and which it likewise had submitted to the Supreme Court, except that we felt that that was so limited that it would make it impossible for us really to make a normal lawful license without running into the court for permission.

Therefore, we have enlarged the provisions of section 2 so that we feel that we can negotiate a license without

constantly troubling this court for approval of the form of license, and specifically in that connection we have added a provision that:

"The license agreement shall be in writing signed by the parties thereto and shall to the extent that licensor has the right to do so, grant to the licensee the full right to make, use and vend the inventions and improvements described in the claims of each patent licensed, in the manu- [fol. 898] facture, sale or use of gypsum board, for the full term of the patent and any renewal, reissue, division, or extension thereof, and may contain the provisions hereinabove set forth and such other lawful provisions as may be agreed upon between the parties thereto and which are not in conflict with any of the provisions of this decree."

Now, with that it would seem to us that if we had some special situation we could work it out, so long as we had a lawful provision, and so long as it did not conflict with any of the provisions of the other articles or sections of the decree.

Chief Judge Stephens: Since you read the (c) on page 8, I would like to ask the answer to a question that has occurred to me as I was reading this decree last night:

"but such reports shall not disclose the selling price of the board, or disclose a breakdown of the size or thickness of the board sold."

I am just curious as to why that provision is contained.

Mr. Spray: Well, that was put in, frankly, to meet an objection which the Government raised. We had not put that provision in, and did not feel that it was necessary, because in making reports, these monthly reports, the licensee naturally would show his total selling price and his quantity and type of board and the royalty.

The Government had felt, and they felt that they were [fol. 899] supported by something said by the Supreme Court, that that might give the licensor some idea of what the selling price of each specific unit was. It would be a very rough average, I assure you, but when the Government raised the point we show no objection to

it, so we included the provision that while they must make the reports from which we can see whether we are getting our royalty, such reports were not to disclose the selling price of the board or to disclose a breakdown of size and thickness of the boards sold.

Chief Judge Stephens: What has the size or thickness to do with the selling price? Do you sell gypsum board by weight?

Mr. Spray: No, you sell it by board or lath. It might be wallboard, and it might be lath, and the wallboard might be of a thickness of 3/8 inch, or it might be half inch, or it might be a quarter inch.

Now, it was felt that if they broke it down as to the specific sizes, like your quarter-inch board and your three-eighths-inch board, and your half-inch board, and then show the quantity and what your total selling price was for your quarter-inch, and your three-eighths-inch, and your half-inch board, you might have a basis of determining what their selling price was.

Chief Judge Stephens: I see.

Mr. Spray: But as I say, it would be a very rough average, I assure you.

Chief Judge Stephens: Then the next one is on page 16: [fol. 900] "The Government seeks access to the records and personnel of the defendants for the purpose of advising itself as to the defendants' compliance with the judgment. See proposed Article VIII. Construing the article as we did in United States v. Bausch & Lomb Co., 321 U. S. 707, 725, n. 6, we think the request reasonable. This article, or one of similar import, should be included in the decree."

Where is that covered?

Mr. Spray: That is covered by Article VIII appearing on pages 11 and 12 of the proposed decree.

Chief Judge Stephens: The next one is likewise on page 16 of the Supreme Court opinion, paragraph (h): 'We have noted the Government's contentions in regard to the individual defendants, Avery, Knode, Baker, Ebsary and Tomkins, and its suggestion that Article III be modified so as to read "defendants" in the first line instead of "defendant companies." It is true that these defendants

signed the questioned agreements, but they were acting as officials and we think the provisions of Article V bar them from engagin- in similar conspiracies.'

Where is that covered?

Mr. Spray: This decree, in the first place, on page 4, Article II, section 1, defines defendant companies as meaning the corporate defendants.

Chief Judge Stephens: Where is that again?

Mr. Spray: Page 4, Article II, Section 1.

[fol. 901] Chief Judge Stephens: Oh, yes.

Mr. Spray: "'Defendant companies' shall mean all of the corporate defendants and Samuel M. Gloyd, doing business under the name of Texas Cement Plaster Company."

When you come to the adjudication in Article III on page 6, it is an adjudication that "The defendant companies have acted in concert".

Chief Judge Stephens: I see.

Mr. Spray: And when you come to Article V, dealing with the injunctive provisions, you will find that it runs against the defendant companies—it reads—"The defendant companies, and their respective officers, directors, [fol. 902] agents, employees, representatives, subsidiaries, and any person acting or claiming to act under"—and so forth, and it does not run against the individual defendants.

Chief Judge Stephens: The last item is on page 17:

"The Government asks that all costs be taxed against the defendant companies. Article IX, proposed decree; Article X, decree entered. We see no reason to interfere with the discretion of the trial court in this matter."

Mr. Spray: That is covered on page 12, Article IX, and that follows the judgment of November 7, 1949, except that we have now received from the Government the amount of what those costs are, and subsequently we have stated them in a dollars and cents fashion, rather than percentage-wise, as we stated them last time.

Chief Judge Stephens: They carry out the previous judgment of the court, however, in terms of dollars and cents?

Mr. Spray: They do, Your Honor.

Chief Judge Stephens: Thank you, Mr. Spray.

Does the Government have any comment upon any of these provisions? Are you satisfied that this decree does conform with the direction of the Supreme Court, Mr. Knuff?

Mr. Knuff: Yes, sir.

Chief Judge Stephens: Mr. Johnston, you were a little tardy this morning. Will you be heard, please, with respect to Samuel Gloyd and the Texas Cement Plaster Company.

[fol. 903] Mr. Johnston: Gentlemen of the court, I just came by to pay my respects to the court. I am out of the case now, to the tune of $14.00, and we are out of business, and I was coming this way, and just came by to sit in at the last session.

Chief Judge Stephens: You are not in a position either to approve or disapprove of this decree, then?

Mr. Johnston: None whatsoever.

Chief Judge Stephens: Is Mr. Gloyd still living?

Mr. Johnston: He is living, but he is in the advance stage of a term the doctors put in their report, the court could not find the definition in the dictionary.

Chief Judge Stephens: Mr. Knuff, we suggest that perhaps you had better present a formal order for the signature of the court with respect to the dismissal of the case as against the defendant Hartley.

Mr. Knuff: I will be glad to do that, Your Honor.

Chief Judge Stephens: Do any of the other defendants' counsel wish to be heard from, or the Government? If not, we will take a recess for ten minutes.

Mr. Spray: Pardon me, Your Honor, but may I just say a word before you recess?

Chief Judge Stephens: Yes.

Mr. Spray: On the matter of this decree, I would call attention to the fact that this form of interim license agreement is referred to in Article VI, and it is provided there [fol. 904] that it is this day a form approved by the court, so it may be that there should be some——

Chief Judge Stephens: Some comment upon the form of the license?

Mr. Spray: (continuing)—some comment, if neces-

sary. At least, I thought there should be some formal approval of that form of license, if the court determines to approve this decree.

Chief Judge Stephens: Wouldn't the approval of the decree, as drawn, involve or imply equivalent to the license?

Mr. Spray: The material point is that it should be filed on the same date that the decree, when signed, is filed, because it is referred to.

Chief Judge Stepehsn: Where do you refer to the license in the decree?

Mr. Spray: It will be in Article VI, section 4.

Chief Judge Stephens: On what page?

Mr. Spray: On page 10, where it is provided that:

"Where an application has been made to this court for the determination of a reasonable royalty under paragraph 3 of this Article, the applicant or the United States Gypsum Company may apply to the court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If the court fixes such interim royalty rate, United States Gypsum Company shall then issue and [fol. 905] the applicant shall accept an interim license agreement effective as of the date of the applicant's last written request for such license hereunder and in the form this day filed herein and approved by the court."

That is the language that I was specifically referring to.

Chief Judge Stephens: This is the proposed license agreement?

Mr. Spray: Yes, that is handed up with the decree.

Chief Judge Stephens: If the decree is signed, do you not think that that language that you have just used would be equal to approval?

Mr. Spray: I think it would be sufficient, provided it is shown in the court record that that form is filed as of the same day as the entry of the decree.

Chief Judge Stephens: Very well. Do you have anything else?

Mr. Spray: Do you have something about the decree?

Mr. Miller: I was going to ask one question about the decree, and that is the suggestion made by the court in regard to agreeing with the Government as to the language

providing in the alternative for an application to a judge of the District Court of the District of Columbia for determination of a reasonable royalty.

Now, how does the court want that to be handled?

Chief Judge Stephens: We are going to discuss that dur-
[fol. 906] ing our recess.

Judge Jackson: We will discuss it, and you fellows discuss it among yourselves while we are in recess.

Chief Judge Stephens: I am not sure that it is feasible, just thinking out loud for the moment, because this is a three-judge expediting court, specially constituted, and it may be that it is not feasible to substitute another court. We simply have to await the eventualities of the future to determine what would happen in the event one of us is not available through retirement, death or otherwise. We will discuss it in chambers and come out and give you an informal chance to discuss it again. Perhaps we will have to leave it as it is.

We will recess for ten minutes.

(Short recess.)

Chief Judge Stephens: We have concluded, gentlemen, that we will only make one amendment in the phrasing of the decree, and that is on page three, in the second paragraph, which we will change to read as follows:

"Upon remand, this court, after ordering counsel for the plaintiff and for the defense to submit forms of decree in conformity with the Supreme Court opinion and after considering such forms had modified its decree of November 7, 1949, in accordance with the Supreme Court's opinion of November 27, 1950."

We have stricken out the words "hearing arguments of
[fol. 907] the respective parties with respect thereto," because we did not hear arguments.

Otherwise, we will leave the decree as drawn.

We have concluded that it is not wise to attempt to put in a provision with respect to an alternative or substitute court. This is the court which is constituted under the Expediting Act, to try this case, and it is the duty of this court, so long as it is possible for it to do so, to administer

and enforce and interpret the decree when necessary, and we will attempt to do it so long as we are able and available, and we will have to take a chance on the future. It would be unusual and anomalous, and perhaps we had better not try to do it.

We approve the form of the license agreement and order it filed. That is to say, the proposed interim license agreement, which is attached to the proposed decree.

We wish to inquire, finally, this case has been extended and controversial and difficult, and so far as possible we would like to avoid future litigation, such as may unavoidably arise, and out of the questions of enforcement, interpretation and application of the decree, we would like to be satisfied that both the defendants and the Government are themselves satisfied with the present form of the decree as proposed for our signature this morning.

We therefore ask the Government, first, are you satisfied, [fol. 908] Mr. Steffen, and Mr. Knuff, that this proposed form of decree is fair and effective in the protection of the rights and interests of the Government?

Mr. Knuff: I am, Your Honor.

Chief Judge Stephens: Are you also, Mr. Steffen?

Mr. Steffen: Yes, Your Honor.

Chief Judge Stephens: With respect to the defendants, are the defendants satisfied that this proposed form of decree is fair and effective in the protection of the rights and interests of the defendants?

Mr. Spray: Speaking on behalf of the United States Gypsum Company, yes, sir, Your Honor, and the individuals Sewell L. Avery and Oliver M. Knode.

Chief Judge Stephens: Mr. Finck.

Mr. Finck: Yes, Your Honor, on behalf of National and Mr. Baker.

Chief Judge Stephens: Mr. Wanless.

Mr. Wanless: On behalf of The Celotex Corporation, yes, sir.

Chief Judge Stephens: And Mr. Johnston, I think you stated you are not authorized to represent anyone.

Is there anyone else who wishes to be heard?

Mr. Miller: On behalf of Certain-Teed Products, I wish to state that the decree has our approval.

Chief Judge Stephens: Now, we ought to get this all done [fol. 909] now, if we can, and sign the decree, and have the case terminated.

This one page needs to be rewritten to make the amendment on page three. I think that can be done by Judge Garrett's secretary.

We understand now that these two forms which we find on the bench this morning are identical with the one, Mr. Spray, which I have been reading from this morning. Will you come up and look at this? This is the one that I have been dealing with and reading from this morning. These two are identical?

Mr. Spray: Yes, sir, they are exactly the same.

Chief Judge Stephens: Very well.

We will have that page rewritten, and I suppose counsel will make changes in their own copies, and then get official copies from the clerk, if necessary.

We will order the license agreement, which is attached to the decree, filed with the decree and made a part of it, and enrolled in the clerk's office, so that it will be official.

We will now take another recess for ten minutes while the page is being written, and then resume and hand the signed decree to the clerk, and the proceeding will be terminated.

(Short recess.)

Chief Judge Stephens: The court has executed the decree, and with the attached license agreement, which has the approval of the court, and it is now handed to the clerk.

[fol. 910] Mr. Marshal, will you now hand this to the Clerk? And here are some extra copies. We have one for each of the judges, and since each of these now contains the corrected page, you may have them, counsel, for as far as they will go around. Then if you do not have enough you will have to make copies of them for yourselves.

Will you hand these also to counsel, Mr. Marshal.

Now, if there is nothing further——

Mr. Spray: I just wanted to say, Your Honor, and I am sure that I speak for all of the attorneys for the defense in saying that we would not want this last hearing to close

without an expression of appreciation to the court for their patient, courteous and judicious attention to very complex, legal and factual matters. I think this case stands so far as I am concerned.

We want you to know that we thoroughly appreciate the time which we know has been expended in this case.

Chief Judge Stephens: Thank you, Mr. Spray, for thus expressing yourself, and I thank the other members of the counsel for the defendants.

Mr. Knuff: May it please the court, the Department has asked me to express to the members of the court, both individually and collectively, its sincere thanks and appreciation for the time and the effort and the consideration that the judges comprising this court, have given to this case. [fol. 911] Speaking for myself, I want the members of this court to know that I join the Department in that expression of thanks and appreciation.

Chief Judge Stephens: Thank you, Mr. Knuff.

Mr. Steffen: May it please the court, I also want to express my complete appreciation for the patience and good temper of the court throughout this matter.

Chief Judge Stephens: We are grateful to counsel for both the Government and defendants for this expression of courteous respect for the manner in which this case was handled, and we in turn want to thank counsel, both for the Government and the defendants, for their diligence and help to the Court, and their courtesy throughout the trial.

It has been a pleasure to try this very important and interesting case, and we are sorry the proceeding is now terminated, but all things must come to an end, including law suits.

Perhaps we will hear you further about royalties.

We wish you well, both personally and officially.

(Whereupon, at 12:00 o'clock noon, the court adjourned.)

[fol. 912] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PETITION OF NATIONAL GYPSUM COMPANY FOR ORDERS, MODIFICATIONS OR DIRECTIONS FOR THE ENFORCEMENT, CONSTRUCTION OR CARRYING OUT OF THE FINAL DECREE OF MAY 15, 1951—Filed March 25, 1953

This petition is in two parts—Claims I and II.

In Claim I, petitioner claims that, on the basis of the Final Decree of May 15, 1951 (hereinafter referred to as "the Final Decree") and the record in this Civil Action No. 8017, petitioner is entitled to the relief requested in its petition. Except for paragraphs 9 to 18, the allegations in Claim I set forth facts which are undisputed and which appear in the record or in the Final Decree. Paragraphs 9 to 18 relate to the claims of United States Gypsum Company (hereinafter referred to as "USG"), made since the [fol. 913] entry of the Final Decree, for payment for the alleged use of certain of USG's patents, for the period prior to May 15, 1951.

In Claim II, petitioner alleges facts extrinsic to the record herein, which petitioner asserts entitles it to substantially the same relief as that prayed for under Claim I.

Petitioner's claim under Claim II need be determined by the Court only if the relief sought under Claim I is denied.

Claim I

1. Petitioner, National Gypsum Company (hereinafter referred to as "National"), is a defendant in the above-entitled action. USG is also a defendant in the above-entitled action.

2. Article X of the Final Decree provides as follows:

> "Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this decree, or any other person, firm or corporation that may hereafter

become bound thereby in whole or in part, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of this decree, and (2) for the enforcement of compliance therewith."

This petition is made pursuant to Article X of the Final Decree.

3. On August 15, 1940, the plaintiff in the above-entitled action, United States of America (hereinafter referred to as "the Government"), filed its complaint herein against USG, patentee, and its licensees, six other manufacturers of gypsum products, and others, charging violations of the Sherman Act. The complaint alleged that USG and the six other manufacturers had entered into, and were engaged in, an unlawful combination which controlled the manu- [fol. 914] facture, distribution and selling prices of gypsum products; and had effectuated the control by means of substantially uniform patent license agreements between USG and the manufacturing defendants, including the license agreement dated October 17, 1929, between USG and National.

4. Under the USG-National license agreement of October 17, 1929, National agreed to pay USG, from the date of the license, royalties at different rates for defined periods of the license. Under said agreement, National agreed to pay USG an amount equivalent to one percent (1%) of the National selling price on all gypsum wallboard and plaster board manufactured and sold by it between July 8, 1941 and the date of the expiration of the last expiring patent issued upon certain applications then pending in the U. S. Patent Office, including an application filed by Carlisle K. Roos, entitled "Cementitious Material", which application was granted on October 8, 1935, by the issuance of United States Patent No. 2,017,022, to USG, as assignee of said Roos application.

5. On June 15, 1946, after the Government had concluded its evidence in chief at the trial, the District Court granted defendants' motion to dismiss, on the ground that no right to relief had been shown. (67 F. Supp. 397.) The District Court entered judgment dismissing the complaint,

and filed its findings of fact and conclusions of law on August 5, 1946.

6. On March 8, 1948, the Supreme Court reversed the holding of the District Court, its findings and conclusions and held *inter alia* that the license agreements between USG and its manufacturing licensees, including the license agreement between USG and National, were unlawful, because under such licenses ". . . the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized." (*U. S. v. U. S. Gypsum Co.*, 333 U. S. 364, 400). The Supreme Court further held that "the provision in the license [fol. 915] contracts that royalties should be paid on the production of unpatented board is strongly indicative of an agreement not to manufacture unpatented board, and the testimony of witnesses is ample to show that there was an understanding, if not a formal agreement, that only patented board would be sold. Such an agreement in purpose and effect increased the area of the patent monopoly and is invalid." (p. 397)

7. After remand of this action to the District Court, the Government moved for summary judgment, which the District Court granted, and then entered judgment in conformity therewith on November 7, 1949. The Government and defendant USG and its associated individual defendants thereafter appealed to the Supreme Court, and said judgment was stayed pending these appeals. USG's prime complaint on its appeal was that summary judgment had been entered in denial of its right to present direct evidence. USG asserted, on this appeal, that its offer of proof would establish that its activities had been entirely lawful. The Government appealed on the ground that the District Court decree was inadequate to cure the ill effects of the illegal conduct of defendants.

8. On May 29, 1950, the appeal of USG and its associated individual defendants was dismissed by the Supreme Court (339 U. S. 959). On the Government's appeal, the Supreme Court held, on November 27, 1950, that the District Court's decree was inadequate to "cure the ill effects of the illegal conduct" (340 U. S. 76, 88), and ordered that

the District Court modify its decree to broaden it in several respects. The District Court modified its prior decree in accordance with the opinion of the Supreme Court of November 27, 1950, and entered the Final Decree herein on May 15, 1951. Article IV of the Final Decree adjudged "unlawful under the anti-trust laws of the United States and illegal, null and void" each of the license agreements between USG and its manufacturing licensees, including the USG-National agreement of October 17, 1929.

[fol. 916] The term "unlawful license" as used hereafter in this petition means each of the license agreements adjudicated unlawful by Article IV of the Final Decree, and listed in Article II 5 of the Final Decree. The term "misused patents" as used hereafter in this petition means all patents licensed by USG under any one or more unlawful licenses.

9. National paid all royalties due under its unlawful license with USG of October 17, 1929, until March 10, 1948, when royalties for the month of February 1948 would have become due, at which time National ceased paying royalties because of the Supreme Court's holding, on March 8, 1948, that said license agreement was unlawful. National thereafter paid no royalties to USG under said unlawful license, until the entry of the Final Decree on May 15, 1951. Some other defendant licensees, including Ebsary Gypsum Company, Inc. (hereinafter referred to as "Ebsary"), Newark Plaster Company (hereinafter referred to as "Newark"), and Certain-Teed Products Corporation (hereinafter referred to as "Certain-Teed"), also failed to pay royalties to USG under their unlawful licenses from approximately February 1 or March 1, 1948 to May 15, 1951.

Some time after May 15, 1951, National and Certain-Teed entered into new agreements with USG, retroactive to May 15, 1951, in which USG licensed National and Certain-Teed under said Roos Patent No. 2,017,022. National and Certain-Teed duly paid all royalties under their respective agreements until the expiration date of said patent. Ebsary and Newark, however, did not enter into new license agreements with USG after May 15, 1951.

10. USG has instituted actions in various Federal District Courts, other than this District Court, to enforce the unlawful licenses made with National, Ebsary, Newark and

Certain-Teed, notwithstanding that each said license is "adjudged unlawful under the anti-trust laws of the United States and illegal, null and void" by Article IV of the Final Decree of this Court.

[fol. 917] In each of these actions, USG seeks to recover the royalties alleged to be due under said unlawful licenses for the period from February 1 or March 1, 1948 to May 15, 1951. Under other counts set forth in each of these actions, USG seeks to recover on alternative legal theories, including infringement, the same amount as is claimed to be due as royalties under each said unlawful license. In each of these actions, infringement is alleged of misused patents for the period from February 1, March 1, or April 1, 1948 to May 15, 1951, except that infringement of some misused patents is also alleged to have continued beyond May 15, 1951 in the actions against Ebsary and Newark, and additional payment is requested therefor. The actions against National, Ebsary, Newark and Certain-Teed are hereinafter more fully described in paragraphs 11 to 14 of this petition.

11. On January 28, 1953, USG commenced an action in the United States District Court for the Northern District of Iowa against National, claiming royalties under said unlawful license in the amount of $1,600,000, for the period from February 1, 1948 to May 15, 1951. A copy of said complaint is attached hereto as *Exhibit A*. Under the first count of said complaint, USG seeks to enforce the provision in said unlawful license with National under which National agreed to pay one percent (1%) of the National selling price on all of the gypsum board made and sold by it, for the period from February 1, 1948 to May 15, 1951. Under an alternative infringement count of said complaint, USG alleges infringement of only one patent, misused patent Roos No. 2,017,022, for the period from February 1, 1948 to May 15, 1951.

12. On or about February 27, 1953, USG commenced an action in the United States District Court for the Southern District of New York against Ebsary, claiming royalties under its unlawful license with Ebsary, in the amount of $100,000, for the period from March 1, 1948 to May 15, 1951. Said complaint is substantially in the same form as that filed against National, and a copy of said com-

[fol. 918] plaint is attached hereto as *Exhibit B.* Under the alternative infringement counts of said complaint, USG alleges infringement of three patents, misused patents Roos Nos. 2,017,022, 2,079,338 and 2,080,009, for the period from March 1, 1948 to May 15, 1951. Infringement of the above misused patents, and also misused patent Roos No. 2,044,-401, is alleged to have continued beyond May 15, 1951, and additional payment is requested therefor.

13. On or about February 27, 1953, USG commenced an action in the United States District Court for the District of New Jersey against Newark, claiming royalties under its unlawful license with Newark, in the amount of $120,000, for the period from February 1, 1948 to May 15, 1951. Said complaint is substantially in the same form as that filed against National, and a copy of said complaint is attached hereto as *Exhibit C.* Under the alternative infringement counts of said complaint, USG alleges infringement of three patents, misused patents Roos Nos. 2,017,022, 2,079,338 and 2,080,009, for the period from February 1, 1948 to May 15, 1951. Infringement of the above misused patents, and also misused patent Roos No. 2,044,401 is alleged to have continued beyond May 15, 1951, and additional payment is requested therefor.

14. On or about March 18, 1953, USG commenced an action in the United States District Court for the Northern District of Iowa againt Certain-Teed, claiming royalties under its unlawful license with Certain-Teed in the amount of $650,000, for the period from April 1, 1948 to May 15, 1951. Said complaint is substantially in the same form as that filed against National, and a copy of said complaint is attached hereto as *Exhibit D.* Under the first count of said complaint, USG seeks to enforce the provision in said unlawful license with Certain-Teed under which Certain-Teed agreed to pay one percent (1%) of the Certain-Teed selling price on all of the gypsum board made and sold by it, for the period from April 1, 1948 to May 15, 1951. Under an alternative infringement count of said complaint, USG [fol. 919] alleges infringement of only one patent, misused patent Roos No. 2,017,022, for the period from April 1, 1948 to May 15, 1951.

15. On information and belief, beginning approximately July 1952, USG has asserted claims against The Celotex Corporation, for royalties under its unlawful license with Celotex, for the period from February 1 or March 1, 1948 to May 15, 1951. USG has also asserted claims for payment for the use of misused patents for the period from February 1, 1948 to May 15, 1951 against Kaiser Gypsum Company and perhaps others. A copy of USG's notice of infringement to Kaiser Gypsum Company, dated July 25, 1952, and correspondence relevant thereto between counsel for USG and counsel for Kaiser Gypsum Company is attached hereto as *Exhibit E*.

16. In essence, USG's suits in other District Courts against National, Ebsary, Newark and Certain-Teed constitute an attempt to obtain the royalties promised under said unlawful licenses, or the equivalent moneys in infringement damages. However, the Final Decree in adjudicating said unlawful licenses as null and void thereby barred USG from enforcing in any manner, directly or indirectly, or under any legal theory, any provision of said unlawful licenses. USG's suits in other District Courts against each of the above companies therefore constitute a circumvention of the Final Decree of this Court.

17. The question of USG's right to collect royalties under its misused patents was in issue before this Court. As a matter of law, USG's misuse of its patents resulted in suspension of its right to enforce its misused patents until such time as it purged its misuse. Before entry of the Final Decree, USG should have applied to this Court for an opportunity to show that it had abandoned its misuse, and that the evil consequences thereof had been dissipated so that it might thereafter enforce its misused patents. USG's failure to so apply now bars it from [fol. 920] claiming compensation for use of its misused patents prior to May 15, 1951.

18. This Court has primary jurisdiction over the question of whether USG's claim for compensation for use of its misused patents for any period prior to the entry of the Final Decree herein is barred as a matter of law on the basis solely of the record and Final Decree herein. Unless this Court exercises its primary jurisdiction over this mat-

ter to construe and enforce the Final Decree of this Court, several different district courts, without intimate knowledge of the voluminous record in this cause, will be compelled to construe this Court's Final Decree.

CLAIM II

19. National repeats and realleges as part of Claim II each and every allegation contained in Paragraphs 1 to 18 of Claim I of this petition, with the same effect as if fully set forth herein.

20. Prior to the entry of the Final Decree, USG, although knowing that some of its licensees had failed to pay royalties under the unlawful licenses, nevertheless did not request this Court to adjudicate the question of whether these royalties were owing to USG, nor did it submit any provision in its proposed Final Decree requiring the defendant-licensees to pay said royalties under the unlawful licenses.

21. USG has not shown that its misuse of its patents has been terminated and the effect of that misuse dissipated in the period between February 1, 1948 and May 15, 1951. On the contrary, it appears that during said period USG continued to misuse its patents, and the effects of such misuse were not dissipated until at least May 15, 1951, the date of entry of the Final Decree, by reason of the following, among others:

A. USG did not during the period from February 1, 1948 to May 15, 1951, abandon any of the [fol. 921] illegal patent practices charged in the Government's complaint and proved at the trial.

B. USG's patent licensing, sales, pricing and distribution policies were conducted at all times between February 1, 1948 and May 15, 1951, in accordance with the terms of the unlawful licenses.

C. USG continued, until at least May 15, 1951, to collect royalties from some of the defendant-licensees, in accordance with the terms of their unlawful licenses.

D. USG continued, until at least May 15, 1951, to collect royaylties on unpatented as well as patented gypsum products.

E. USG continued, until at least May 15, 1951, to sell and distribute its gypsum products under the same terms and conditions as those prescribed in its unlawful licenses.

F. USG continued, until at least May 15, 1951, to refrain from selling gypsum products to jobbers.

G. USG failed and refused, until at least May 15, 1951, to grant licenses under its misused patents to all applicants on lawful and unrestricted terms and conditions.

H. USG continued to assert, until at least May 29, 1950 (339 U. S. 960), that its unlawful licenses with defendant-licensees were legal in every respect.

[fol. 922] PRAYER

Wherefore, petitioner prays

WITH RESPECT TO CLAIM I:

I. That the Court restrain USG, until this petition is finally determined, from taking any steps in furtherance of any action by it against National, or from commencing any new action against National, in which USG claims payment for any period of time prior to May 15, 1951, for the use of any misused patent.

II. That the Court direct USG to file its answer to this petition.

III. That the Court, on the basis of the record already made in this Civil Action No. 8017, modify its Final Decree by ordering and directing USG to discontinue and dismiss, with prejudice to USG, its pending action against National.

IV. That the Court, on the basis of the record already made in this Civil Action No. 8017, modify its Final Decree by permanently enjoining USG from asserting any claim against National for payment for the use of its misused patents, and from instituting or threatening to institute, or maintaining or continuing any action for payment for the use of any misused patent, for any period of time prior to May 15, 1951.

V. That the petitioner have such further and general relief as may be proper.

WITH RESPECT TO CLAIM II:

I. That the Court restrain USG, until this petition is finally determined, from taking any steps in furtherance of any action by it against National, or from commencing any new action against National, in which USG claims payment for any period of time prior to May 15, 1951, for the use of any misused patent.

[fol. 923] II. That the Court direct USG to file its answer to this petition.

III. That the Court, on the basis of the record already made in this Civil Action No. 8017, and on the basis of this petition, other pleadings and all evidence taken pursuant thereto, modify its Final Decree by ordering and directing USG to discontinue and dismiss, with prejudice to USG, its pending action against National.

IV. That the Court, on the basis of the record already made in this Civil Action No. 8017, and on the basis of this petition, other pleadings and all evidence taken pursuant thereto, enjoin USG from asserting any claim against National for payment for the use of its misused patents, and from instituting or threatening to institute, or maintaining or continuing any action for payment for the use of any misused patent, for any period of time prior to May 15, 1951.

V. That the petitioner have such further and general relief as may be proper.

March 25, 1953.

Finck & Huber, Esqs., Attorneys for Petitioner,
804 Liberty Bank Building, Buffalo 2, New York
By (S.) Elmer E. Finck.

Rosenman Goldmark Colin & Kaye, Esqs., 575 Madison Avenue, New York 22, New York, Of Counsel.

Seymour Krieger, 514 Wyatt Building, Washington 5, D. C.

[fols. 924-925] *Duly sworn to by L. R. Sanderson. Jurat omitted in printing.*

[fol. 926] EXHIBIT A TO PETITION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF IOWA, CENTRAL DIVISION
Civil Action No. 564

Filed Jan. 28, 1953. Lee McNeely, Clerk, By (S.) Jane Sullivan, Deputy Clerk.

UNITED STATES GYPSUM COMPANY, an Illinois corporation,
Plaintiff,

vs.

NATIONAL GYPSUM COMPANY, a Delaware corporation,
Defendant

COMPLAINT

Plaintiff, United States Gypsum Company, for complaint against defendant, National Gypsum Company, alleges as follows:

COUNT I

FOR A FIRST SEPARATE AND DISTINCT CLAIM:

1. Plaintiff, United States Gypsum Company (referred to hereinafter as U. S. Gypsum), is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, having its principal place of business at Chicago, Illinois. U. S. Gypsum has qualified as a foreign corporation to do business in the State of Iowa and for many years has been and is doing business within the Northern District of Iowa.

2. Defendant, National Gypsum Company (referred to hereinafter as National), is a corporation duly organized [fol. 927] and existing under and by virtue of the laws of the State of Delaware. National has qualified as a foreign corporation to do business in the State of Iowa and has a regular and established place of business in Webster County, State of Iowa. For many years National has been and is doing business with the Central Division of the Northern District of Iowa.

3. This Court has jurisdiction by reason of the fact that plaintiff, U. S. Gypsum, is a corporation incorporated under the laws of the State of Illinois, and that defendant, National, is a corporation incorporated under the laws of the State of Delaware, and that the matter in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars ($3,000). This civil action is being brought in a judicial district in which defendant is a resident within the meaning of Section 1391 of Title 28, U. S. Code.

4. On October 17, 1929, U. S. Gypsum, as Licensor, and National, as Licensee, entered into a license agreement under the terms of which, and for the considerations therein set forth, National was licensed to make, use and sell gypsum wallboard, gypsum lath, gypsum sheathing and other similar boards (all of which are referred to collectively hereinafter as gypsum board) embodying or made by the use of the inventions set forth and claimed in those certain Letters Patent and Applications for Letters Patent described in said agreement, and including United States Letters Patent thereafter granted upon any of said Applications, for the full term of said Letters Patent, all as in said license agreements set forth, a true copy of which agreement is attached hereto as Exhibit A to this Count and made a part hereof.

5. On October 8, 1935, Letters Patent of the United States No. 2,017,022, relating to cementitious material, was duly and legally granted to U. S. Gypsum as assignee on Application Serial No. 733,197 theretofore filed by Carlisle K. Roos on August 20, 1924, which application was included [fol. 928] in the said license agreement of October 17, 1929, and said Letters Patent No. 2,017,022 duly became Letters Patent under said license so granted to National.

6. It was provided in said license agreement that for the privilege of using said patents National would pay to U. S. Gypsum certain amounts as therein set forth, among them an amount, referred to therein as a license fee or royalty, equivalent to one per cent (1%) of National's selling price of gypsum board manufactured and sold by it between July 8, 1941, and the date of the expiration of the last to expire of any patent granted or issued on said Ap-

plication Serial No. 733,197, upon which Application said Letters Patent No. 2,017,022 was issued as aforesaid on October 8, 1935.

7. Commencing with the license fees or royalties under said license agreement for the month of February, 1948 (payable under said license agreement on or before the 20th day of March, 1948) and continuing to May 15, 1951, National failed and refused to pay any such license fees or royalties to U. S. Gypsum, although during the whole of said period National continued under its said license to manufacture and sell gypsum board embodying or made by the use of the inventions disclosed and claimed in said Letters Patent No. 2,017,022.

8. There is now due and payable to U. S. Gypsum by National as license fees or royalties under said license agreement an amount equal to one per cent (1%) of the selling price of National of all of said gypsum board so manufactured and sold by it between February 1, 1948, and May 15, 1951, embodying or made by the use of inventions disclosed and claimed in said Letters Patent No. 2,017,022.

9. Pursuant to the provisions of said license agreement of October 17, 1929, National as such Licensee, during the period commencing on February 1, 1948, and ending on May 14, 1951, manufactured and sold great quantities of said gypsum board embodying or made by the use of the inventions disclosed and claimed in said Letters Patent No. [fol. 929] 2,017,022 and sold the same for an amount aggregating, to-wit: One Hundred Sixty Million Dollars ($160,000,000), for which said National has become indebted to U. S. Gypsum for license fees or royalties aggregating One Million Six Hundred Thousand Dollars ($1,600,000), which said license fees and royalties said National has wholly failed and refused to pay in whole or in part, although often requested so to do.

Count II

For a Second Separate and Distinct Claim

1. Plaintiff repeats and alleges as part of this claim each and all of the allegations contained in paragraphs 1, 2, 3, 4, 5 and 6 of Count I of the Complaint with like effect as if herein fully set forth.

2. On or about February 1, 1948, National discontinued the payment of said license fees or royalties but nevertheless continued under its said license to manufacture and sell gypsum board embodying or made by the use of the inventions disclosed and claimed in said Letters Patent No. 2,017,022. U. S. Gypsum and National each having determined to discontinue compliance with the provisions of said license agreement, agreed, and it was so understood between them, that National would account for and pay to U. S. Gypsum under said license agreement the said license fee or royalty of one per cent (1%) of National's selling price for gypsum board actually manufactured and sold by it embodying or made by the use of the inventions disclosed and claimed in said Letters Patent No. 2,017,022. It was further understood and agreed that no further performance would be required by either party under said license agreement except that National could continue to use said patents thereunder and would account for and pay to U. S. Gypsum all such license fees or royalties for the actual use of said patents as aforesaid. National continued to so manufacture and sell said gypsum board under [fol. 930] its said license until May 15, 1951, and thereupon became and now is indebted to U. S. Gypsum in an amount therefor equal to one per cent (1%) of its selling price of all such gypsum board manufactured and sold by it between February 1, 1948, and May 15, 1951, embodying or made by the use of the inventions and improvements disclosed and claimed in said Letters Patent No. 2,017,022.

3. National, during the period commencing February 1, 1948, and ending May 14, 1951, manufactured and sold great quantities of said gypsum board embodying or made by the use of the inventions disclosed and claimed in said Letters Patent No. 2,017,022 and sold the same for an amount aggregating, to-wit: One Hundred Sixty Million Dollars ($160,000,000) for which National has become indebted to U. S. Gypsum for license fees or royalties in an amount aggregating One Million Six Hundred Thousand Dollars ($1,600,000), which said license fees or royalties so payable as aforesaid National has wholly failed and refused to pay in whole or in part, although often requested so to do.

Count III

For a Third Separate and Distinct Claim:

1. Plaintiff repeats and alleges as part of this claim each and all of the allegations contained in paragraphs 1, 2 and 3 of Count I of the Complaint with like effect as if herein fully set forth.

2. On October 17, 1929, U. S. Gypsum, as Licensor, and National, as Licensee, entered into a license agreement under the terms of which, and for the considerations therein set forth, National was licensed to make, use and sell gypsum wallboard, gypsum lath, gypsum sheathing and other similar boards (all of which are referred to collectively hereinafter as gypsum board) embodying or made by the use of the inventions set forth and claimed in those certain Letters Patent and Applications for Letters Patent described in said agreement, and including United States [fol. 931] Letters Patent thereafter granted upon any of said Applications, for the full term of said Letters Patent, all as in said license agreement set forth.

3. On October 8, 1935, Letters Patent of the United States No. 2,017,022, relating to cementitious material, was duly and legally granted to U. S. Gypsum as assignee on Application Serial No. 733,197 theretofore filed by Carlisle K. Roos on August 20, 1924, which application was included in said license agreement of October 17, 1929, and said Letters Patent No. 2,017,022 duly became Letters Patent under said license so granted to National.

4. It was provided in said license agreement that for the privilege of using said patents National would pay to U. S. Gypsum certain amounts as therein set forth, among them an amount, referred to therein as a license fee or royalty, equivalent to one per cent (1%) of National's selling price of gypsum board manufactured and sold by it between July 8, 1941, and the date of the expiration of the last to expire of any patent granted or issued on said Application Serial No. 733,197, upon which Application said Letters Patent No. 2,017,022 was issued as aforesaid on October 8, 1935.

5. On or about the 1st day of February, 1948, National repudiated its said license agreement of October 17, 1929,

and discontinued the payment of all license fees or royalties payable or to be paid thereunder and refused to be bound by any of the provisions thereof. U. S. Gypsum acquiesced in such repudiation and thereafter each of the parties thereto treated the license agreement as rescinded and no action was subsequently taken by either of them to comply with or to enforce any of the provisions thereof or to require the other to perform the same.

6. National then and there at its request made use of U. S. Gypsum's Letters Patent No. 2,017,022 in the manufacture and sale of gypsum board embodying or made by the use of the inventions disclosed and claimed therein and continued to so use the same until May 15, 1951. National [fol. 932] in consideration thereof promised to pay to U. S. Gypsum the reasonable value of the use of plaintiff's Letters Patent No. 2,017,022 from the time of such repudiation to May 15, 1951.

7. National, during such period, manufactured great quantities of said gypsum board embodying or made by the use of the inventions disclosed and claimed in said Letters Patent No. 2,017,022, and sold the same for an amount aggregating, to-wit: One Hundred Sixty Million Dollars ($160,000,000). The fair and reasonable value of such use of said Letters Patent is not less than one per cent (1%) of National's said selling price of such gypsum board so manufactured and sold by it as aforesaid.

8. National thereupon became indebted to U. S. Gypsum in an amount aggregating, to-wit: One Million Six Hundred Thousand Dollars ($1,600,000), being the fair and reasonable value of the use of said Letters Patent, and being so indebted National, in consideration thereof, then and there promised U. S. Gypsum to pay it the said sum of money, on request. Yet National, though requested, has not paid the same or any part thereof to U. S. Gypsum but refuses so to do, to the damage of U. S. Gypsum of One Million Six Hundred Thousand Dollars ($1,600,000).

Count IV

For a Fourth Separate and Distinct Claim:

1. Plaintiff repeats and alleges as part of this claim each and all of the allegations contained in paragraphs 1,

2 and 3 of Count I of the Complaint with like effect as if herein fully set forth.

2. For that whereas the defendant National on the 28th day of January, 1953, in the Northern District of Iowa, Central Division, and elsewhere throughout the United States, was indebted to the plaintiff U. S. Gypsum in the sum of One Million Six Hundred Thousand Dollars ($1,600,000) for the use of the plaintiff's Letters Patent of [fol. 933] the United States No. 2,017,022 in the manufacture and sale of its gypsum board embodying or made by the use of the inventions disclosed and claimed in said Letters Patent, during the period between February 1, 1948 and May 15, 1951 used and enjoyed by the defendant National at its request, and being so indebted, the defendant National, in consideration thereof, then and there promised the plaintiff U. S. Gypsum to pay it the said sum of money, on request. Yet the defendant National, though requested, has not paid the same, or any part thereof, to the plaintiff U. S. Gypsum, but refuses so to do; to the damage of the plaintiff U. S. Gypsum of One Million Six Hundred Thousand Dollars ($1,600,000).

Count V

For a Fifth Separate and Distinct Claim:

1. Plaintiff repeats and alleges as part of this claim each and all of the allegations contained in paragraphs 1 and 2 of Count I of the Complaint, with like effect as if herein fully set forth.

2. This Court has jurisdiction by reason of the fact that this is a civil action based upon United States Letters Patent No. 2,017,022, dated October 8, 1935, arising under the patent laws of the United States, as hereinafter more fully appears. This action is being brought in a judicial district where defendant has committed acts of infringement and has a regular and established place of business within the meaning of Section 1400 of Title 28, U. S. Code.

3. On October 8, 1935, Letters Patent of the United States No. 2,017,022, relating to cementitious material, was duly and legally granted to U. S. Gypsum as assignee on the Application Serial No. 733,197, theretofore filed by

Carlisle K. Roos on August 20, 1924, and all right, title and interest in said United States Letters Patent No. 2,017,022 remained in U. S. Gypsum during the entire life of said Letters Patent.

[fol. 934] 4. National has, within the last six years prior to the filing of this Complaint, and since the issuance of said Letters Patent, beginning on February 1, 1948, and continuing until May 15, 1951, without authority or permission of U. S. Gypsum, infringed said Letters Patent No. 2,017,-022 willfully and deliberately by making, selling and using within the United States, including the use and sale thereof within the Northern District of Iowa, Central Division, gypsum board (including but without limitation gypsum wallboard, gypsum lath, gypsum sheathing, and other similar boards containing a cellular core composed of cementitious material) embodying or made by the use of, the inventions disclosed and claimed in said Letters Patent.

5. National, during all periods pertinent to the Complaint, has had full knowledge of Letters Patent No. 2,017,022 and of the fact that all right, title and interest therein and thereto was in U. S. Gypsum, but despite said knowledge, National continued and persisted in such infringement, as aforesaid.

6. By reason of the aforesaid infringement, National has derived unlawful gains and profits which plaintiff would otherwise have received but for the aforesaid infringement, to the damage of the plaintiff in the sum of One Million Six Hundred Thousand Dollars ($1,600,000).

Wherefore, plaintiff, U. S. Gypsum, prays as follows:

(a) If the Court finds that defendant, National, is indebted to plaintiff, U. S. Gypsum, as alleged in either Counts I, II, III or IV hereof, that judgment be entered against said defendant for the sum of One Million Six Hundred Thousand Dollars ($1,600,000), together with interest and costs of this suit;

(b) Or in the alternative, if the Court finds that defendant, National, has infringed U. S. Gypsum's Letters Patent No. 2,017,022, as charged in Count V hereof, that judgment be entered against the defendant for due compensation for making, using, and selling said

invention, not less than a reasonable royalty therefor, [fol. 935] in the sum of One Million Six Hundred Thousand Dollars ($1,600,000), together with costs of this suit.

(S.) Cranston Spray, Robert C. Keck, MacLeish, Spray, Price & Underwood, 134 South LaSalle Street, Chicago 3, Illinois.

(S.) Arthur A. Olson, Thiess, Olson, Mecklenburger, vonHolst and Coltman, 77 West Washington Street, Chicago, Illinois.

(S.) Bert B. Burnquist, Burnquist, Helsell & Burnquist, State Bank Building, Fort Dodge, Iowa, Attorneys for the Plaintiff.

The agreement of October 17th, 1929, between United States Gypsum Company and National Gypsum Company, which is attached to Exhibit A, is omitted. Said agreement appears in the transcript of record of Civil Action No. 8017 commencing at p. 9384, and in the transcript of record in the Supreme Court of the United States, October Term, 1947, No. 13 at p. 4355.

[fol. 936] EXHIBIT B TO PETITION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 83-83

UNITED STATES GYPSUM COMPANY, an Illinois corporation,
Plaintiff,

vs.

EBSARY GYPSUM COMPANY, INC., a New York corporation,
Defendant

COMPLAINT

Plaintiff, United States Gypsum Company, for complaint against defendant, Ebsary Gypsum Company, Inc., alleges as follows:

Count I

For a First Separate and Distinct Claim:

1. Plaintiff, United States Gypsum Company (referred to hereinafter as U. S. Gypsum), is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, having its principal place of business at Chicago, Illinois. U. S. Gypsum has qualified as a foreign corporation to do business in the State of New York and for many years has been and is doing business within said state.

2. Defendant, Ebsary Gypsum Company, Inc. (referred to hereinafter as Ebsary), is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

[fol. 937] 3. This Court has jurisdiction by reason of the fact that plaintiff, U. S. Gypsum, is a corporation incorporated under the laws of the State of Illinois, and that defendant, Ebsary is a corporation incorporated under the laws of the State of New York, and that the matter in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars ($3,000.00). This civil action is being brought in a judicial district in which defendant is a resident within the meaning of Section 1391 of Title 28, U. S. Code.

4. On October 18, 1929, U. S. Gypsum, as Licensor, and Ebsary, as Licensee, entered into a license agreement under the terms of which, and for the considerations therein set forth, Ebsary was licensed to make, use and sell gypsum wallboard, gypsum lath, gypsum sheathing and other similar boards (all of which are referred to collectively hereinafter as gypsum board) embodying or made by the use of the inventions set forth and claimed in those certain Letters Patent and Applications for Letters Patent described in said agreement, and including United States Letters Patent thereafter granted upon any of said Applications, for the full term of said Letters Patent, all as in said license agreement set forth, a true copy of which agreement is attached hereto as Exhibit A to this Count and made a part hereof.

5. On the dates hereinafter shown, the following Letters Patent of the United States were duly and legally granted to U. S. Gypsum as assignee on Applications Serial Nos. 733,197, 3,477 and 142,155, respectively, theretofore filed by Carlisle K. Roos, which Applications were included in the said license agreement of October 18, 1929:

Patent No. 2,017,022, issued October 8, 1935;
Patent No. 2,079,338, issued May 4, 1937;
Patent No. 2,080,009, issued May 11, 1937.

Said Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009 duly became Letters Patent under said license so granted to Ebsary.

[fol. 938] 6. It was provided in said license agreement that, for the privilege of using said patents, Ebsary would pay to U. S. Gypsum certain amounts as therein set forth, among them an amount, referred to therein as a license fee or royalty, equivalent to one per cent (1%) of Ebsary's selling price of gypsum board manufactured and sold by it between July 8, 1941 and the date of the expiration of the last to expire of any patent granted or issued on said Applications Serial Nos. 733,197, 3,477 and 142,155, upon which Applications said Letters Patent Nos. 2,017,022, 2,079,338, and 2,080,009 were issued as aforesaid on October 8, 1935, May 4, 1937 and May 11, 1937, respectively.

7. Commencing with the license fees or royalties under said license agreement for the month of March, 1948 (payable under said license agreement on or before the 20th day of April, 1948) and continuing to May 15, 1951, Ebsary failed and refused to pay any such license fees or royalties to U. S. Gypsum, although during the whole of said period Ebsary continued under its said license to manufacture and sell gypsum board embodying or made by the use of the inventions disclosed and claimed in one or more of said Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009.

8. There is now due and payable to U. S. Gypsum by Ebsary as license fees or royalties under said license agreement an amount equal to one per cent (1%) of the selling price of Ebsary of all of said gypsum board so manufactured and sold by it between March 1, 1948, and May 15, 1951, embodying or made by the use of inventions disclosed

and claimed in one or more of said Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009.

9. Pursuant to the provisions of said license agreement of October 18, 1929, Ebsary as such Licensee thereunder, during the period commencing on March 1, 1948, and ending on May 14, 1951, manufactured and sold great quantities of said gypsum board embodying or made by the use of the inventions disclosed and claimed in one or more of said Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009, and [fol. 939] sold the same for an amount aggregating, to-wit: Ten Million Dollars ($10,000,000) for which said Ebsary has become indebted to U. S. Gypsum for license fees or royalties aggregating One Hundred Thousand Dollars ($100,000), which said license fees and royalties said Ebsary has wholly failed and refused to pay in whole or in part, although often requested so to do.

Count II

For a Second Separate and Distinct Claim:

1. Plaintiff repeats and alleges as part of this claim each and all of the allegations contained in paragraphs 1, 2, 3, 4, 5 and 6 of Count I of the Complaint with like effect as if herein fully set forth.

2. On or about March 1, 1948, Ebsary discontinued the payment of said license fees or royalties but nevertheless continued under its said license to manufacture and sell gypsum board embodying or made by the use of the inventions disclosed and claimed in one or more of said Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009. U. S. Gypsum and Ebsary each having determined to discontinue compliance with the provisions of said license agreement, agreed, and it was so understood between them, that if Ebsary used any of said Letters Patent in the manufacture and sale of gypsum board, Ebsary would account for and pay to U. S. Gypsum under said license agreement the said license fee or royalty of one per cent (1%) of Ebsary's selling price for gypsum board actually manufactured and sold by it embodying or made by the use of the inventions disclosed and claimed in one or more of said Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009. It

was further understood and agreed that no further performance would be required by either party under said license agreement except that if Ebsary continued to use said patents thereunder it would account for and pay to [fol. 940] U. S. Gypsum all such license fees or royalties for the actual use of said patents as aforesaid. Ebsary continued to so manufacture and sell said gypsum board under its said license until May 15, 1951, and thereupon became and now is indebted to U. S. Gypsum in an amount therefor equal to one per cent (1%) of its selling price of all such gypsum board manufactured and sold by it between March 1, 1948, and May 15, 1951, embodying and claimed in one or more of said Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009.

3. Ebsary, during the period commencing March 1, 1948, and ending May 14, 1951, manufactured and sold great quantities of said gypsum board embodying or made by the use of the inventions disclosed and claimed in one or more of said Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009, and sold the same for an amount aggregating, to-wit: Ten Million Dollars ($10,000,000) for which Ebsary has become indebted to U. S. Gypsum for license fees or royalties in an amount aggregating One Hundred Thousand Dollars ($100,000), which said license fees or royalties so payable as aforesaid Ebsary has wholly failed and refuesd to pay in whole or in part, although often requested so to do.

Count III

For a Third Separate and Distinct Claim:

1. Plaintiff repeats and alleges as part of this claim each and all of the allegations contained in paragraphs 1, 2 and 3 of Count I of the Complaint with like effect as if herein fully set forth.

2. On October 18, 1929, U. S. Gypsum, as Licensor, and Ebsary, as Licensee, entered into a license agreement under the terms of which, and for the considerations therein set forth, Ebsary was licensed to make, use and sell gypsum wallboard, gypsum lath, gypsum sheathing and other similar boards (all of which are referred to collectively herein- [fol. 941] after as gypsum board) embodying or made by

the use of the inventions set forth and claimed in those certain Letters Patent and Applications for Letters Patent described in said agreement, and including United States Letters Patent thereafter granted upon any of said Applications, for the full term of said Letters Patent, all as in said license agreement set forth.

3. On the dates hereinafter shown, the following Letters Patent of the United States were duly and legally granted to U. S. Gypsum as assignee on Applications Serial Nos. 73,197, 3,477 and 142,155, respectively, therefore filed by Carlisle K. Roos, which Applications were included in the license agreement of October 18, 1929:

Patent No. 2,017,022, issued October 8, 1935;
Patent No. 2,079,338, issued May 4, 1937;
Patent No. 2,080,009, issued May 11, 1937.

Said Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009 duly became Letters Patent under said license so granted to Ebsary.

4. It was provided in said license agreement that, for the privilege of using said patents, Ebsary would pay to U. S. Gypsum certain amounts as therein set forth, among them an amount, referred to therein as a license fee or royalty, equivalent to one per cent (1%) of Ebsary's selling price of gypsum board manufactured and sold by it between July 8, 1941, and the date of the expiration of the last to expire of any patent granted or issued on said Applications Serial Nos. 733,197, 3,477 and 142,155, upon which Applications said Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009 were issued as aforesaid on October 8, 1935, May 4, 1937 and May 11, 1937, respectively.

5. On or about the 1st day of March, 1948, Ebsary repudiated its said license agreement of October 18, 1929, and discontinued the payment of all license fees or royalties payable or to be paid thereunder and refused to be bound by any of the provisions thereof. U. S. Gypsum acquiesced [fol. 942] in such repudiation, and thereafter each of the parties thereto treated the license agreement as rescinded and no action was subsequently taken by either of them to comply with or to enforce any of the provisions thereof or to require the other to perform the same.

6. Ebsary then and there at its request, made use of said U. S. Gypsum's Letters Patent No. 2,017,022 in the manufacture and sale of gypsum board embodying or made by the use of the inventions disclosed and claimed therein, and continued to so use the same through October 8, 1952, the date on which said patent expired, and then and there at its request made use of said United States Letters Patent Nos. 2,079,338 and 2,080,009, in the manufacture and sale of gypsum board embodying or made by the use of the inventions disclosed and claimed therein, and continued to so use the same to the date of the filing of this Complaint. Ebsary in consideration thereof, promised to pay to U. S. Gypsum the reasonable value of the use of plaintiff's Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009, during the periods such patents were used by Ebsary as aforesaid.

7. Ebsary, during such period, manufactured great quantities of said gypsum board embodying or made by the use of the inventions disclosed and claimed in one or more of said Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009, and sold the same for an amount aggregating, to-wit: Sixteen Million Dollars ($16,000,000). The fair and reasonable value of such use of said Letters Patent is not less than one per cent (1%) of Ebsary's said selling price of such gypsum board so manufactured and sold by it as aforesaid.

8. Ebsary thereupon became indebted to U. S. Gypsum in an amount aggregating, to-wit: One Hundred Sixty Thousand Dollars ($160,000), being the fair and reasonable value of the use of said Letters Patent, and being so indebted Ebsary, in consideration thereof, then and there promised U. S. Gypsum to pay it the said sum of money, on request. Yet, Ebsary, though requested, has not paid the same or any part thereof to U. S. Gypsum but refuses so [fol. 943] to do, to the damage of U. S. Gypsum of One Hundred Sixty Thousand Dollars ($160,000).

Count IV

For a Fourth Separate and Distinct Claim:

1. Plaintiff repeats and alleges as part of this claim each and all of the allegations contained in paragraphs 1,

2, and 3 of Count I of the Complaint with like effect as if herein fully set forth.

2. For that whereas the defendant Ebsary on the 26th day of February, 1953, in the Southern District of New York, and elsewhere throughout the United States, was indebted to the plaintiff U. S. Gypsum in the sum of One Hundred Sixty Thousand Dollars ($160,000) for the use of the plaintiff's Letters Patent of the United States Nos. 2,017,022, 2,079,338 and 2,080,009, in the manufacture and sale of its gypsum board embodying or made by the use of the inventions disclosed and claimed in said Letters Patent, during the period between March 1, 1948 and the date of the filing of this Complaint, used and enjoyed by the defendant Ebsary at its request, and being so indebted, the defendant, Ebsary, in consideration thereof, then and there promised the plaintiff U. S. Gypsum to pay it the said sum of money, on request. Yet the defendant Ebsary, though requested, has not paid the same, or any part thereof, to the plaintiff U. S. Gypsum, but refuses so to do; to the damage of the plaintiff U. S. Gypsum of One Hundred Sixty Thousand Dollars ($160,000).

Count V

For a Fifth Separate and Distinct Claim:

1. Plaintiff repeats and alleges as part of this claim each and all of the allegations contained in paragraphs 1 and 2 of Count I of the Complaint, with like effect as if herein fully set forth.

[fol. 944] 2. This Court has jurisdiction by reason of the fact that this is a civil action arising under the patent laws of the United States, as hereinafter more fully appears. This action is being brought in a judicial district where defendant Ebsary resides within the meaning of Section 1400 of Title 28, U. S. Code.

3. On October 8, 1935, Letters Patent of the United States No. 2,017,022, relating to cementitious material, was duly and legally granted to U. S. Gypsum as assignee on Application Serial No. 733,197, theretofore filed by Carlisle K. Roos on August 20, 1924, and all right, title and interest in said United States Letters Patent No. 2,017,022 remained

in U. S. Gypsum during the entire life of said Letters Patent.

4. On May 4, 1937, Letters Patent of the United States No. 2,079,338, relating to cementitious material, was duly and legally granted to U. S. Gypsum as assignee on Application Serial No. 3,477, theretofore filed by Carlisle K. Roos on January 19, 1925, and, since the date of grant as aforesaid, U. S. Gypsum has been and still is the owner of all right, title and interest in said United States Letters Patent No. 2,079,338.

5. On May 11, 1937, Letters Patent of the United States No. 2,080,009, relating to plaster wallboard and method of making it, was duly and legally granted to U. S. Gypsum as assignee on Application Serial No. 142,155, theretofore filed by Carlisle K. Roos on October 16, 1926, and, since the date of grant as aforesaid, U. S. Gypsum has been and still is the owner of all right, title and interest in said United States Letters Patent No. 2,080,009.

6. Ebsary has, within the last six years prior to the filing of this Complaint, and since the issuance of said Letters Patent No. 2,017,022, beginning on March 1, 1948, and continuing through October 8, 1952, without authority or permission of U. S. Gypsum, infringed said Letters Patent No. 2,017,022, wilfully and deliberately by making, selling [fol. 945] and using within the United States, including the use and sale thereof within the State of New York, gypsum board (including but without limitation gypsum wallboard, gypsum lath, gypsum sheathing, and other similar boards containing a cellular core composed of cementitious material) embodying, or made by the use of, the inventions disclosed and claimed in said Letters Patent.

7. Ebsary has, within the last six years prior to the filing of this Complaint, and since the issuance of the aforesaid Letters Patent Nos. 2,079,338 and 2,080,009, and each of them, beginning on March 1, 1948, without authority or permission of U. S. Gypsum, infringed said Letters Patent No. 2,079,338 and No. 2,080,009, and each of them, wilfully and deliberately by making, selling and using within the United States, including the use and sale thereof within the State of New York, gypsum board (including but without limitation gypsum wallboard, gypsum lath, gypsum sheath-

ing, and other similar boards containing a cellular core composed of cementitious material) embodying, or made by the use of, the inventions disclosed and claimed in said Letters Patents and each of them.

8. Ebsary, during all periods pertinent to the Complaint, has had full knowledge of Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009 and of the fact that all right, title and interest therein and thereto was in U. S. Gypsum, but despite said knowledge, Ebsary continued and persisted in such infringement as aforesaid.

9. By reason of the aforesaid infringement, Ebsary has derived unlawful gains and profits which plaintiff would otherwise have received but for the aforesaid infringement, to the damage of the plaintiff in the sum of One Hundred Sixty Thousand Dollars ($160,000).

[fol. 946]

Count VI

For a Sixth Separate and Distinct Claim:

1. Plaintiff repeats and alleges as part of this claim each and all of the allegations contained in paragraphs 1 and 2 of Count I of the Complaint and in paragraph 2 of Count V of the Complaint, with like effect as if herein fully set forth.

2. On June 16, 1936, Letters Patent of the United States No. 2,044,401, relating to core composition and method of manufacturing same, was duly and legally granted to U. S. Gypsum as assignee on Application Serial No. 386,189, theretofore filed by Carlisle K. Roos on August 15, 1929, and since the date of grant as aforesaid, U. S. Gypsum has been and still is the owner of all right, title and interest in said United States Letters Patent No. 2,044,401.

3. Ebsary has, within the last six years prior to the filing of this Complaint, and since the issuance of said Letters Patent, without authority or permission of U. S. Gypsum, infringed said Letters Patent No. 2,044,401, wilfully and deliberately by making, selling and using within the United States, including the use and sale thereof within the State of New York, gypsum board (including but without limitation gypsum wallboard, gypsum lath, gypsum sheathing, and other similar boards comprising a cementi-

tious material) embodying, or made by the use of, the inventions disclosed and claimed in said Letters Patent.

4. U. S. Gypsum has placed the required statutory notice on all gypsum board made and sold by it under said Letters Patent No. 2,044,401 since the date of issuance thereof, but despite such notice, Ebsary infringed said patent as aforesaid and has continued and persisted in such infringement to the time of the filing of this Complaint. [fol. 947] 5. By reason of the aforesaid infringement, Ebsary has derived unlawful gains and profits which plaintiff would otherwise have received but for the aforesaid infringement, to the damage of the plaintiff in the sum of Eighty-Five Thousand Dollars ($85,000).

Wherefore, plaintiff U. S. Gypsum prays as follows:

(a) If the Court finds that the defendant Ebsary is indebted to plaintiff U. S. Gypsum, for the period from March 1, 1948 to May 15, 1951, as alleged in either Counts I, II, III or IV hereof, and for the period from May 15, 1951 to the date of the filing of the Complaint herein, as alleged in either Counts III or IV hereof, that judgment be entered against said defendant for the sum of One Hundred Sixty Thousand Dollars ($160,000), together with interest and costs of this suit; or

(b) In the alternative, if the Court finds that defendant, Ebsary, has infringed U. S. Gypsum's Letters Patent No. 2,017,022 in the period from March 1, 1948, through October 8, 1952, and has infringed U. S. Gypsum's Letters Patent Nos. 2,079,338 and 2,080,009, or either of them, in the period from March 1, 1948, to the time of the filing of this Complaint, as alleged in Count V hereof, that judgment be entered against the said defendant for due compensation for making, using and selling said inventions, not less than a reasonable royalty therefor, in the sum of One Hundred Sixty Thousand Dollars ($160,000), together with costs of this suit; and

(c) If the Court finds that defendant, Ebsary, has infringed U. S. Gypsum's Letters Patent No.

2,044,401, as alleged in Count VI hereof, that judgment be entered against the said defendant for due compensation for making, using and selling said inventions, not less than a reasonable royalty therefor, [fol. 948] in the sum of Eighty-Five Thousand Dollars ($85,000), together with costs of this suit.

Cravath, Swaine & Moore, By (S.) Bruce Bromley, a member of the firm, 15 Broad St., New York 5, New York.

MacLeish, Spray, Price & Underwood, By (S.) Cranston Spray, a member of the firm, 134 South LaSalle Street, Chicago 3, Illinois.

Thiess, Olson, Mecklenburger, vonHolst and Coltman, By (S.) Arthur A. Olson, a member of the firm, 77 West Washington Street, Chicago 2, Illinois.

(S.) Cranston Spray, Robert Keck, Arthur A. Olson, Bruce Bromley, Of Counsel.

The agreement of October 18, 1929, between United States Gypsum Company and Ebsary Gypsum Company, which is attached to Exhibit B, is omitted. Said agreement appears in the transcript of record of Civil Action No. 8017 commencing at p. 9442, and in the transcript of record in the Supreme Court of the United States, October Term, 1947, No. 13, commencing at p. 4402.

[fol. 949] EXHIBIT C TO PETITION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 93-53

UNITED STATES GYPSUM COMPANY, an Illinois corporation,
Plaintiff,

vs.

NEWARK PLASTER COMPANY, a New Jersey corporation,
Defendant

COMPLAINT

Plaintiff, United States Gypsum Company, for complaint against defendant, Newark Plaster Company, alleges as follows:

COUNT I

FOR A FIRST SEPARATE AND DISTINCT CLAIM:

1. Plaintiff, United States Gypsum Company (referred to hereinafter as U. S. Gypsum), is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, having its principal place of business at Chicago, Illinois. U. S. Gypsum has qualified as a foreign corporation to do business in the State of New Jersey and for many years has been and is doing business within said state.

2. Defendant Newark Plaster Company (referred to hereinafter as Newark), is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey.

[fol. 950] 3. This Court has jurisdiction by reason of the fact that plaintiff, U. S. Gypsum, is a corporation incorporated under the laws of the State of Illinois, and that defendant, Newark, is a corporation incorporated under the laws of the State of New Jersey, and that the matter in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars ($3,000). This action is being brought in a judicial district in which defendant is a

resident within the meaning of Section 1391 of Title 28, U. S. Code.

4. On April 23, 1930, U. S. Gypsum, as Licensor, and Kelley Plasterboard Company, Inc., a New Jersey corporation, hereinafter referred to as Kelley, as Licensee, entered into a license agreement under the terms of which, and for the considerations therein set forth, Kelley was licensed to make, use and sell gypsum wallboard, gypsum lath, gypsum sheathing and other similar boards (all of which are referred to collectively hereinafter as gypsum board) embodying or made by the use of the inventions set forth and claimed in those certain Letters Patent and Applications for Letters Patent described in said agreement, and including United States Letters Patent thereafter granted upon any of said Applications, for the full term of said Letters Patent, all as in said license agreement set forth, a true copy of which agreement is attached hereto as Exhibit A to this Count and made a part hereof.

5. Subsequently, on or about December 31, 1938, a merger was effected between said Newark and said Kelley Plasterboard Company, Inc., in accordance with the provisions of the New Jersey Corporation Law and under the corporate name of Newark Plaster Company, and said Kelley Plasterboard Company, Inc. assigned, transferred and set over unto Newark all of its right, title and interest in and to said license agreement of April 23, 1930, and the rights, licenses and privileges therein contained, and Newark agreed to and did assume all of the obligations of Licensee under said license agreement and agreed to be bound by all of the terms and conditions thereof to the same effect [fol. 951] as if Newark originally had been named in said license agreement as Licensee therein. Prior to February 1, 1948, U. S. Gypsum consented to said assignments made by said Kelley Plasterboard Company, Inc. to Newark of said license agreement of April 23, 1930, and acknowledged that said license agreement was in full force and effect with Newark as the Licensee thereunder in place of Kelley Plasterboard Company, Inc.

6. On the dates hereinafter shown, the following Letters Patent of the United States were duly and legally granted to U. S. Gypsum as assignee on Applications Serial Nos.

733,197, 3,477 and 142,155, respectively, theretofore filed by Carlisle K. Roos, which Applications were included in the said license agreement of April 23, 1930:

Patent No. 2,017,022, issued October 8, 1935;
Patent No. 2,079,338, issued May 4, 1937;
Patent No. 2,080,009, issued May 11, 1937.

Said Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009 duly became Letters Patent under said license so granted to Newark.

7. It was provided in said license agreement that, for the privilege of using said patents, Licensee would pay to U. S. Gypsum certain amounts as therein set forth, among them an amount, referred to therein as a license fee or royalty, equivalent to one per cent (1%) of Licensee's selling price of gypsum board manufactured and sold by it between July 8, 1941, and the date of the expiration of the last to expire of any patent granted or issued on said Applications Serial No. 733,197, 3,477 and 142,155, upon which Applications said Letters Patent Nos. 2,017,022, 2,079,338, and 2,080,009 were issued as aforesaid on October 8, 1935, May 4, 1937 and May 11, 1937, respectively.

8. Commencing with the license fees or royalties under said license agreement for the month of February, 1948 (payable under said license agreement on or before the 20th day of March, 1948) and continuing to May 15, 1951, [fol. 952] Newark failed and refused to pay any such license fees or royalties to U. S. Gypsum, although during the whole of said period Newark continued to manufacture and sell gypsum board embodying or made by the use of the inventions disclosed and claimed in one or more of said Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009.

9. There is now due and payable to U. S. Gypsum by Newark as license fees or royalties under said license agreement an amount equal to one per cent (1%) of the selling price of Newark of all of said gypsum board so manufactured and sold by it between February 1, 1948, and May 15, 1951, embodying or made by the use of inventions disclosed and claimed in one or more of said Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009.

10. Pursuant to the provisions of said license agreement

of April 23, 1930, Newark as such Licensee thereunder, during the period commencing on February 1, 1948, and ending on May 14, 1951, manufactured and sold great quantities of said gypsum board embodying or made by the use of the inventions disclosed and claimed in one or more of said Letters Patent No. 2,017,022, No. 2,079,338 and No. 2,080,009, and sold the same for an amount aggregating, to-wit: Twelve Million Dollars ($12,000,000) for which said Newark had become indebted to U. S. Gypsum for license fees or royalties aggregating One Hundred Twenty Thousand Dollars ($120,000), which said license fees and royalties said Newark has wholly failed and refused to pay in whole or in part, although often requested so to do.

Count II

For a Second Separate and Distinct Claim:

1. Plaintiff repeats and alleges as part of this claim each and all of the allegations contained in paragraphs 1, 2, 3, 4, 5, 6 and 7 of Count I of the complaint with like effect as if herein fully set forth.

[fol. 953] 2. On or about February 1, 1948, Newark discontinued the payment of said license fees or royalties but nevertheless continued under its said license to manufacture and sell gypsum board embodying or made by the use of the inventions disclosed and claimed in one or more of said Letters Patent No. 2,017,022, No. 2,079,338 and No. 2,080,009. U. S. Gypsum and Newark each having determined to discontinue compliance with the provisions of said license agreement, agreed, and it was so understood between them, that if Newark used any of said Letters Patent in the manufacture and sale of gypsum board, Newark would account for and pay to U. S. Gypsum under said license agreement the said license fee or royalty of one per cent (1%) of Newark's selling price for gypsum board actually manufactured and sold by it embodying or made by the use of the inventions disclosed and claimed in one or more of said Letters Patent No. 2,017,022, No. 2,079,338 and No. 2,080,009. It was further understood and agreed that no further performance would be required by either party under said license agreement except that if Newark continued to use said

patents thereunder it would account for and pay to U. S. Gypsum all such license fees or royalties for the actual use of said patents as aforesaid. Newark continued to so manufacture and sell said gypsum board under its said license until May 15, 1951, and thereupon became and now is indebted to U. S. Gypsum in an amount therefor equal to one per cent (1%) of its selling price of all such gypsum board manufactured and sold by it between February 1, 1948, and May 15, 1951, embodying and claimed in one or more of said Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009.

3. Newark, during the period commencing February 1, 1948, and ending May 14, 1951, manufactured and sold great quantities of said gypsum board embodying or made by the use of the inventions disclosed and claimed in one or more of said Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009, and sold the same for an amount aggregating, to-wit: Twelve Million Dollars ($12,000,000) for which Newark has become indebted to U. S. Gypsum for license [fol. 954] fees or royalties in an amount aggregating One Hundred Twenty Thousand Dollars ($120,000), which said license fees or royalties so payable as aforesaid Newark has wholly failed and refused to pay in whole or in part, although often requested so to do.

Count III

For a Third Separate and Distinct Claim:

1. Plaintiff repeats and alleges as part of this claim each and all of the allegations contained in paragraphs 1. 2 and 3 of Count I of the complaint with like effect as if herein fully set forth.

2. On April 23, 1930, U. S. Gypsum, as Licensor, and Kelley Plasterboard Company, Inc., a New Jersey corporation, as Licensee, entered into a license agreement under the terms of which, and for the considerations therein set forth, Kelley was licensed to make, use and sell gypsum wallboard, gypsum lath, gypsum sheathing and other similar boards (all of which are referred to collectively hereinafter as gypsum board) embodying or made by the use of the inventions set forth and claimed in those certain Letters

Patent and Applications for Letters Patent described in said agreement, and including United States Letters Patent thereafter granted upon any of said Applications, for the full term of said Letters Patent, all as in said license agreement set forth.

3. Subsequently, on or about December 31, 1938, a merger was effected between said Newark and said Kelley Plasterboard Company, Inc., in accordance with the provisions of the New Jersey Corporation Law and under the corporate name of Newark Plaster Company, and said Kelley Plasterboard Company, Inc. assigned, transferred and set over unto Newark all of its right, title and interest in and to said license agreement of April 23, 1930, and the rights, license and privileges therein contained, and Newark agreed to and did assume all of the obligations of Licensee [fol. 955] under said license agreement and agreed to be bound by all of the terms and conditions thereof to the same effect as if Newark originally had been named in said license agreement as Licensee therein. Prior to February 1, 1948, U. S. Gypsum consented to said assignment made by said Kelley Plasterboard Company, Inc. to Newark of said license agreement of April 23, 1930, and acknowledged that said license agreement was in full force and effect with Newark as the Licensee thereunder in place of Kelly Plasterboard Company, Inc.

4. On the dates hereinafter shown, the following Letters Patent of the United States were duly and legally granted to U. S. Gypsum as assignee on Applications Serial Nos. 733,197, 3,477 and 142,155, respect*fu*lly, theretofore filed by Carlisle K. Roos, which Applications were included in the said license agreement of April 23, 1930:

Patent No. 2,017,022, issued October 8, 1935;
Patent No. 2,079,338, issued May 4, 1937;
Patent No. 2,080,009, issued May 11, 1937.

Said Letters Patent No. 2,017,022, 2,079,338 and 2,080,009 duly became Letters Patent under said license so granted to Newark.

5. It was provided in said license agreement that, for the privilege of using said patents, Licensee would pay to U. S. Gypsum certain amounts as therein set forth, among

them an amount, referred to therein as a license fee or royalty, equivalent to one per cent (1%) of Licensee's selling price of gypsum board manufactured and sold by it between July 8, 1941, and the date of the expiration of the last to expire of any patent granted or issued on said Applications Serial Nos. 733,197, 3,477 and 142,155, upon which Applications said Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009 were issued as aforesaid on October 8, 1935, May 4, 1937 and May 11, 1937, respectively.

6. On or about the 1st day of February, 1948, Newark repudiated its said license agreement of April 23, 1930, and [fol. 956] discontinued the payment of all license fees or royalties payable or to be paid thereunder and refused to be bound by any of the provisions thereof. U. S. Gypsum acquiesced in such repudiation, and thereafter each of the parties thereto treated the license agreement as rescinded and no action was subsequently taken by either of them to comply with or to enforce any of the provisions thereof or to require the other to perform the same.

7. Newark then and there at its request, made use of said U. S. Gypsum's Letters Patent No. 2,017,022 in the manufacture and sale of gypsum board embodying or made by the use of the inventions disclosed and claimed therein, and continued to so use the same through October 8, 1952, the date on which said patent expired, and then and there at its request made use of said United States Letters Patent No. 2,079,338 and No. 2,080,009, in the manufacture and sale of gypsum board embodying or made by the use of the inventions disclosed and claimed therein, and continued to so use the same to the date of the filing of this complaint. Newark in consideration thereof, promised to pay to U. S. Gypsum the reasonable value of the use of plaintiff's Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009, during the periods such patents were used by Newark as aforesaid.

8. Newark, during such period, manufactured great quantities of said gypsum board embodying or made by the use of the inventions disclosed and claimed in one or more of said Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009, and sold the same for an amount aggregating, to-wit: Eighteen Million Five Hundred Thousand Dollars ($18,500,000). The fair and reasonable value of such use of

said Letters Patent is not less than one per cent (1%) of Newark's said selling price of such gypsum board so manufactured and sold by it as aforesaid.

9. Newark thereupon became indebted to U. S. Gypsum in an amount aggregating, to-wit: One Hundred Eighty-Five Thousand Dollars ($185,000), being the fair and reasonable value of the use of said Letters Patent, and being so [fol. 957] indebted Newark, in consideration thereof, then and there promised U. S. Gypsum to pay it the said sum of money on request. Yet Newark, though requested, has not paid the same or any part thereof to U. S. Gypsum but refuses so to do, to the damage of U. S. Gypsum of One Hundred Eighty-Five Thousand Dollars ($185,000).

Count IV

For a Fourth Separate and Distinct Claim:

1. Plaintiff repeats and alleges as part of this claim each and all of the allegations contained in paragraphs 1, 2 and 3 of Count I of the complaint with like effect as if herein fully set forth.

2. For that whereas the defendant Newark on the 30th day of January, 1953, in the State of New Jersey, and elsewhere throughout the United States, was indebted to the plaintiff U. S. Gypsum in the sum of One Hundred Eighty-Five Thousand Dollars ($185,000) for the use of the plaintiff's Letters Patent of the United States Nos. 2,017,022, 2,079,338, and 2,080,009, in the manufacture and sale of its gypsum board embodying or made by the use of the inventions disclosed and claimed in said Letters Patent, during the period between February 1, 1948 and the date of the filing of this complaint, used and enjoyed by the defendant Newark at its request, and being so indebted, the defendant Newark, in consideration thereof, then and there promised the plaintiff U. S. Gypsum to pay it the said sum of money, on request. Yet the defendant Newark, though requested, has not paid the same, or any part thereof, to the plaintiff U. S. Gypsum, but refuses so to do: to the damage of the plaintiff U. S. Gypsum of One Hundred Eighty-Five Thousand Dollars ($185,000).

[fol. 958] Count V

For a Fifth Separate and Distinct Claim:

1. Plaintiff repeats and alleges as part of this claim each and all of the allegations contained in paragraphs 1 and 2 of Count I of the complaint, with like effect as if herein fully set forth.

2. This Court has jurisdiction by reason of the fact that this is a civil action arising under the patent laws of the United States, as hereinafter more fully appears. This action is being brought in a judicial district where defendant resides within the meaning of Section 1400 of Title 28, U. S. Code.

3. On October 8, 1935, Letters Patent of the United States No. 2,017,022, relating to cementitious material, was duly and legally granted to U. S. Gypsum as assignee on the Application Serial No. 733,197, theretofore filed by Carlisle K. Roos on August 20, 1924, and all right, title and interest in said United States Letters Patent No. 2,017,022 remained in U. S. Gypsum during the entire life of said Letters Patent.

4. On May 4, 1937, Letters Patent of the United States No. 2,079,338, relating to cementitious material, was duly and legally granted to U. S. Gypsum as assignee on Application Serial No. 3,477, theretofore filed by Carlisle K. Roos on January 19, 1925, and, since the date of grant as aforesaid, U. S. Gypsum has been and still is the owner of all right, title and interest in said United States Letters Patent No. 2,079,338.

5. On May 11, 1937, Letters Patent of the United States No. 2,080,009, relating to plaster wallboard and method of making it, was duly and legally granted to U. S. Gypsum as assignee on Application Serial No. 142,155, theretofore filed by Carlisle K. Roos on October 16, 1926, and, since the date of grant as aforesaid, U. S. Gypsum has been [fol. 959] and still is the owner of all right, title and interest in said United States Letters Patent No. 2,080,009.

6. Newark has, within the last six years prior to the filing of this complaint, and since the issuance of said Letters Patent No. 2,017,022, beginning on February 1, 1948, and continuing through October 8, 1952, without authority or permission of U. S. Gypsum, infringed said

Letters Patent No. 2,017,022 wilfully and deliberately by making, selling and using within the United States, including the use and sale thereof within the State of New Jersey, gypsum board (including but without limitation gypsum wallboard, gypsum lath, gypsum sheathing, and other similar boards containing a cellular core composed of cementitious material) embodying, or made by the use of, the inventions disclosed and claimed in said Letters Patent.

7. Newark has, within the last six years prior to the filing of this complaint, and since the issuance of the aforesaid letters patent and each of them, and beginning on February 1, 1948, without authority or permission of U. S. Gypsum, infringed said Letters Patent No. 2,079,338 and No. 2,080,009, and each of them, wilfully and deliberately by making, selling and using within the United States, including the use and sale thereof within the state of New Jersey, gypsum board (including but without limitation gypsum wallboard, gypsum lath, gypsum sheathing, and other similar boards containing a cellular core composed of cementitious material) embodying, or made by the use of, the inventions disclosed and claimed in said letters patent and each of them.

8. Newark, during all periods pertinent to the complaint, has had full knowledge of Letters Patent Nos. 2,017,022, 2,079,338 and 2,080,009 and of the fact that all right, title and interest therein and thereto was in U. S. Gypsum, but despite said knowledge, Newark continued and persisted in such infringement, as aforesaid.

9. By reason of the aforesaid infringement, Newark has derived unlawful gains and profits which plaintiff would [fol. 960] otherwise have received but for the aforesaid infringement, to the damage of the plaintiff in the sum of One Hundred Eighty-Five Thousand Dollars ($185,000).

Count VI

For a Sixth Separate and Distinct Claim:

1. Plaintiff repeats and alleges as part of this claim each and all of the allegations contained in paragraphs 1 and 2 of Count I of the complaint and in paragraph 2

of Count V of the complaint, with like effect as if herein fully set forth.

2. On June 16, 1936, Letters Patent of the United States No. 2,044,401, relating to core composition and method of manufacturing same, was duly and legally granted to U. S. Gypsum as assignee on Application Serial No. 386,189, theretofore filed by Carlisle K. Roos on August 15, 1929, and since the date of grant as aforesaid, U. S. Gypsum has been and still is the owner of all right, title and interest in said United States Letters Patent No. 2,044,401.

3. Newark has, within the last six years prior to the filing of this complaint, and since the issuance of said letters patent, without authority or permission of U. S. Gypsum, infringed said Letters Patent No. 2,044,401 wilfully and deliberately by making, selling and using within the United States, including the use and sale thereof within the state of New Jersey, gypsum board (including but without limitation gypsum wallboard, gypsum lath, gypsum sheathing, and other similar boards comprising a cementitious material) embodying or made by the use of the inventions disclosed and claimed in said letters patent.

4. Newark during all periods pertinent to the complaint has had full knowledge of Letters Patent No. 2,044,401, and of the fact that all right, title and interest therein and thereto was in U. S. Gypsum, but despite said knowledge, Newark infringed said patent as aforesaid and has [fol. 961] continued and persisted in such infringement to the time of the filing of this complaint.

5. By reason of the aforesaid infringement, Newark has derived unlawful gains and profits which plaintiff would otherwise have received but for the aforesaid infringement, to the damage of the plaintiff in the sum of One Hundred Thousand Dollars ($100,000).

Wherefore, plaintiff U. S. Gypsum prays as follows:

(a) If the Court finds that defendant Newark is indebted to plaintiff U. S. Gypsum, for the period from February 1, 1948 to May 15, 1951, as alleged in either Counts I, II, III or IV hereof, and for the period from May 15, 1951 to the date of the filing of

the complaint herein, as alleged in either Counts III or IV hereof, that judgment be entered against said defendant for the sum of One Hundred Eighty-Five Thousand Dollars ($185,000), together with interest and costs of this suit; or

(b) In the alternative, if the Court finds that defendant Newark, has infringed U. S. Gypsum's Letters Patent No. 2,017,022 in the period from February 1, 1948, through October 8, 1952, and has infringed U. S. Gypsum's Letters Patents Nos. 2,079,338 and 2,080,009, or either of them in the period from February 1, 1948, to the time of the filing of this complaint, as alleged in Count V hereof, that judgment be entered against the said defendant for due compensation for making, using and selling said inventions, not less than a reasonable royalty therefor, in the sum of One Hundred Eighty-Five Thousand Dollars ($185,000), together with costs of this suit; and

(c) If the Court finds that defendant, Newark, has infringed U. S. Gypsum's Letters Patent No. 2,044,401, as alleged in Count VI hereof, that judgment be entered against the said defendant for due compensation for making, using and selling said inventions, not less than [fol. 962] a reasonable royalty therefor, in the sum of One Hundred Thousand Dollars ($100,000), together with costs of this suit.

Stryker, Tams & Horner, by Josiah Stryker, Josiah Stryker, a member of the firm, 744 Broad Street, Newark 2, New Jersey, MacLeish, Spray, Price & Underwood, by Cranston Spray, Cranston Spray, a member of the firm, 134 South LaSalle Street, Chicago 3, Illinois, Theiss, Olson, Mecklenburger, vonHolst and Coltman, by Arthur A. Olson, Arthur A. Olson, a member of the firm, 77 West Washington Street, Chicago, Illinois, *Attorneys for Plaintiff.*

Cranston Spray, Cranston Spray, Robert C. Keck, Robert C. Keck, Arthur A. Olson, Arthur A. Olson, Josiah Stryker, Josiah Stryker, *Of Counsel.*

The agreement of April 23rd, 1930, between United States Gypsum Company and Kelley Plasterboard Company, Inc., which is attached to Exhibit C, is omitted. Said agreement appears in the transcript of record of Civil Action No. 8017 commencing at p. 9535, and in the transcript of record in the Supreme Court of the United States, October Term, 1947, No. 13, at p. 4474.

[fol. 963] EXHIBIT D TO PETITION

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CENTRAL DIVISION

Civil Action No. 568

UNITED STATES GYPSUM COMPANY, an Illinois Corporation, Plaintiff,

vs.

CERTAIN-TEED PRODUCTS CORPORATION, a Maryland Corporation, Defendant

COMPLAINT

Plaintiff, United States Gypsum Company, for complaint against defendant, Certain-teed Products Corporation, alleges as follows:

Count I

For a First Separate and Distinct Claim:

1. Plaintiff, United States Gypsum Company (referred to hereinafter as U. S. Gypsum), is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, having its principal place of business at Chicago, Illinois. U. S. Gypsum has qualified as a foreign corporation to do business in the State of Iowa and for many years has been and is doing business within the Northern District of Iowa.

2. Defendant, Certain-teed Products Corporation (referred to hereinafter as Certain-teed), is a corporation duly organized and existing under and by virtue of the laws of

[fol. 964] the State of Maryland. Certain-teed has qualified as a foreign corporation to do business in the State of Iowa and has a regular and established place of business in Webster County, State of Iowa. For many years Certain-teed has been and is doing business within the Central Division of the Northern District of Iowa.

3. This Court has jurisdiction by reason of the fact that plaintiff, U. S. Gypsum, is a corporation incorporated under the laws of the State of Illinois, and that defendant, Certain-teed, is a corporation incorporated under the laws of the State of Maryland, and that the matter in controversy exceeds, exclusive of interests and costs, the sum of Three Thousand Dollars ($3,000). This civil action is being brought in a judicial district in which defendant is a resident within the meaning of Section 1391 of Title 28, U. S. Code.

4. On October 15, 1929, U. S. Gypsum, as Licensor, and Certain-teed, as Licensee, entered into a license agreement under the terms of which, and for the considerations therein set forth, Certain-teed was licensed to make, use and sell gypsum wallboard, gypsum lath, gypsum sheathing and other similar boards (all of which are referred to collectively hereinafter as gypsum board) embodying or made by the use of the inventions set forth and claimed in those certain Letters Patent and Applications for Letters Patent described in said agreement, and including United States Letters Patent thereafter granted upon any of said Applications, for the full term of said Letters Patent, all as in said license agreement set forth, a true copy of which agreement is attached hereto as Exhibit A to this Count and made a part hereof.

5. On October 8, 1935, Letters Patent of the United States No. 2,017,022, relating to cementitious material, was duly and legally granted to U. S. Gypsum as assignee on Application Serial No. 733,197 theretofore filed by Carlisle K. Roos on August 20, 1924, which application was included in the said license agreement of October 15, 1929, and said [fol. 965] Letters Patent No. 2,017,022 duly became Letters Patent under said license so granted to Certain-teed.

6. It was provided in said license agreement that for the privilege of using said patents Certain-teed would pay

to U. S. Gypsum certain amounts as therein set forth, among them an amount, referred to therein as a license fee or royalty, equivalent to one per cent (1%) of Certain-teed's selling price of gypsum board manufactured and sold by it between July 8, 1941, and the date of the expiration of the last to expire of any patent granted or issued on said Application Serial No. 733,197, upon which Application said Letters Patent No. 2,017,022 was issued as aforesaid on October 8, 1935.

7. Commencing with the license fees or royalties under said license agreement for the month of April, 1948 (payable under said license agreement on or before the 20th day of May, 1948) and continuing to May 15, 1951, Certain-teed failed and refused to pay any such license fees or royalties to U.S. Gypsum, although during the whole of said period Certain-teed continued under its said license to manufacture and sell gypsum board embodying or made by the use of the inventions disclosed and claimed in said Letters Patent No. 2,017,022.

8. There is now due and payable to U. S. Gypsum by Certain-teed as license fees or royalties under said license agreement an amount equal to one per cent (1%) of the selling price of Certain-teed of all of said gypsum board so manufactured and sold by it between April 1, 1948 and May 15, 1951, embodying or made by the use of inventions disclosed and claimed in said Letters Patent No. 2,017,022.

9. Pursuant to the provisions of said license agreement of October 15, 1929, Certain-teed as such Licensee, during the period commencing on April 1, 1948, and ending on May 14, 1951, manufactured and sold great quantities of said gypsum board embodying or made by the use of the inventions disclosed and claimed in said Letters Patent No. 2,017,022 and sold the same for an amount aggregating, to-[fol. 966] wit: Sixty-Five Million Dollars ($65,000,000), for which said Certain-teed has become indebted to U. S. Gypsum for license fees or royalties aggregating Six Hundred Fifty Thousand Dollars ($650,000), which said license fees and royalties said Certain-teed has wholly failed and refused to pay in whole or in part, although often requested so to do.

Count II

For a Second Separate and Distinct Claim:

1. Plaintiff repeats and alleges as part of this claim each and all of the allegations contained in paragraphs 1, 2, 3, 4, 5 and 6 of Count I of the Complaint with like effect as if herein fully set forth.

2. On or about April 1, 1948, Certain-teed discontinued the payment of said license fees or royalties but nevertheless continued under its said license to manufacture and sell gypsum board embodying or made by the use of the inventions disclosed and claimed in said Letters Patent No. 2,017,022. U. S. Gypsum and Certain-teed each having determined to discontinue compliance with the provisions of said license agreement, agreed, and it was so understood between them, that Certain-teed would account for and pay to U. S. Gypsum under said license agreement the said license fee or royalty of one per cent (1%) of Certain-teed's selling price for gypsum board actually manufactured and sold by it embodying or made by the use of the inventions disclosed and claimed in said Letters Patent No. 2,017,022. It was further understood and agreed that no further performance would be required by either party under said license agreement except that Certain-teed could continue to use said patents thereunder and would account for and pay to U. S. Gypsum all such license fees or royalties for the actual use of said patents as aforesaid. Certain-teed continued to so manufacture and sell said gypsum board under its said license until May 15, 1951, and thereupon became and now is indebted to U. S. Gypsum in an [fol. 967] amount therefor equal to one per cent (1%) of its selling price of all such gypsum board manufactured and sold by it between April 1, 1948, and May 15, 1951, embodying or made by the use of the inventions and improvements disclosed and claimed in said Letters Patent No. 2,017,022.

3. Certain-teed, during the period commencing April 1, 1948, and ending May 14, 1951, manufactured and sold great quantities of said gypsum board embodying or made by the use of the inventions disclosed and claimed in said Letters Patent No. 2,017,022 and sold the same for an

amount aggregating, to-wit: Sixty-Five Million Dollars ($65,000,000) for which Certain-teed has become indebted to U. S. Gypsum for license fees or royalties in an amount aggregating Six Hundred Fifty Thousand Dollars ($650,-000), which said license fees or royalties so payable as aforesaid Certain-teed has wholly failed and refused to pay in whole or in part, although often requested so to do.

Count III

For a Third Separate and Distinct Claim:

1. Plaintiff repeats and alleges as part of this claim each and all of the allegations contained in paragraphs 1, 2 and 3 of Count I of the Complaint with like effect as if herein fully set forth.

2. On October 15, 1929, U. S. Gypsum, as Licensor, and Certain-teed, as Licensee, entered into a license agreement under the terms of which, and for the considerations therein set forth, Certain-teed was licensed to make, use and sell gypsum wallboard, gypsum lath, gypsum sheathing and other similar boards (all of which are referred to collectively hereinafter as gypsum board) embodying or made by the use of the inventions set forth and claimed in those certain Letters Patent and Applications for Letters Patent described in said agreement, and including United States Letters Patent thereafter granted upon any of said Appli-[fol. 968] cations, for the full term of said Letters Patent, all as in said license agreement set forth.

3. On October 8, 1935, Letters Patent of the United States No. 2,017,022, relating to cementitious material, was duly and legally granted to U. S. Gypsum as assignee on Application Serial No. 733,197 theretofore filed by Carlisle K. Roos on August 20, 1924, which application was included in the said license agreement of October 15, 1929, and said Letters Patent No. 2,017,022 duly became Letters Patent under said license so granted to Certain-teed.

4. It was provided in said license agreement that for the privilege of using said patents Certain-teed would pay to U. S. Gypsum certain amounts as therein set forth, among them an amount, referred to therein as a license fee or royalty, equivalent to one per cent (1%) of Certain-teed's selling price of gypsum board manufactured and

sold by it between July 8, 1941, and the date of the expiration of the last to expire of any patent granted or issued on said Application Serial No. 733,197, upon which Application said Letters Patent No. 2,017,022 was issued as aforesaid on October 8, 1935.

5. On or about the 1st day of April, 1948, Certain-teed repudiated its said license agreement of October 15, 1929, and discontinued the payment of all license fees or royalties payable or to be paid thereunder and refused to be bound by any of the provisions thereof. U. S. Gypsum acquiesced in such repudiation and thereafter each of the parties thereto treated the license agreement as rescinded and no action was subsequently taken by either of them to comply with or to enforce any of the provisions thereof or to require the other to perform the same.

6. Certain-teed then and there at its request made use of U. S. Gypsum's Letters Patent No. 2,017,022 in the manufacture and sale of gypsum board embodying or made by the use of the inventions disclosed and claimed therein and continued to so use the same until May 15, 1951. Certain-teed in consideration thereof promised to pay to [fol. 969] U. S. Gypsum the reasonable value of the use of plaintiff's Letters Patent No. 2,017,022 from the time of such repudiation to May 15, 1951.

7. Certain-teed, during such period, manufactured great quantities of said gypsum board embodying or made by the use of the inventions disclosed and claimed in said Letters Patent No. 2,017,022, and sold the same for an amount aggregating, to-wit: Sixty-Five Million Dollars ($65,000,000). The fair and reasonable value of such use of said Letters Patent is not less than one per cent (1%) of Certain-teed's said selling price of such gypsum board so manufactured and sold by it as aforesaid.

8. Certain-teed thereupon became indebted to U. S. Gypsum in an amount aggregating, to-wit: Six Hundred Fifty Thousand Dollars ($650,000), being the fair and reasonable value of the use of said Letters Patent, and being so indebted Certain-teed, in consideration thereof, then and there promised U. S. Gypsum to pay it the said sum of money, on request. Yet Certain-teed, though requested, has not paid the same or any part thereof to U. S. Gypsum

but refuses so to do, to the damage of U. S. Gypsum of Six Hundred Fifty Thousand Dollars ($650,000).

Count IV

For a Fourth Separate and Distinct Claim:

1. Plaintiff repeats and realleges as part of this claim each and all of the allegations contained in paragraphs 1, 2 and 3 of Count I of the Complaint with like effect as if herein fully set forth.

2. For that whereas the defendant Certain-teed on the 11th day of March, 1953, in the Northern District of Iowa, Central Division, and elsewhere throughout the United States, was indebted to the plaintiff U. S. Gypsum in the sum of Six Hundred Fifty Thousand Dollars ($650,000) for the use of the plaintiff's Letters Patent of the United States No. 2,017,022 in the manufacture and sale of its [fol. 970] gypsum board embodying or made by the use of the inventions disclosed and claimed in said Letters Patent, during the period between April 1, 1948 and May 15, 1951 used and enjoyed by the defendant Certain-teed at its request, and being so indebted, the defendant Certain-teed, in consideration thereof, then and there promised the plaintiff U. S. Gypsum to pay it the said sum of money, on request. Yet the defendant Certain-teed, though requested, has not paid the same, or any part thereof, to the plaintiff U. S. Gypsum, but refuses so to do; to the damage of the plaintiff U. S. Gypsum of Six Hundred Fifty Thousand Dollars ($650,000).

Count V

For a Fifth Separate and Distinct Claim:

1. Plaintiff repeats and alleges as part of this claim each and all of the allegations contained in paragraphs 1 and 2 of Count I of the Complaint, with like effect as if herein fully set forth.

2. This Court has jurisdiction by reason of the fact that this is a civil action based upon United States Letters Patent No. 2,017,022, dated October 8, 1935, arising under the patent laws of the United States, as hereinafter more fully appears. This action is being brought in a judicial

district where defendant has committed acts of infringement and has a regular and established place of business within the meaning of Section 1400 of Title 28, U. S. Code.

3. On October 8, 1935, Letters Patent of the United States No. 2,017,022, relating to cementitious material, was duly and legally granted to U. S. Gypsum as assignee on the Application Serial No. 733,197, theretofore filed by Carlisle K. Roos on August 20, 1924, and all right, title and interest in said United States Letters Patent No. 2,017,022 remained in U. S. Gypsum during the entire life of said Letters Patent.

4. Certain-teed has, within the last six years prior to the filing of this Complaint, and since the issuance of said [fol. 971] Letters Patent, beginning on April 1, 1948, and continuing until May 15, 1951, without authority or permission of U. S. Gypsum, infringed said Letters Patent No. 2,017,022 wilfully and deliberately by making, selling and using within the United States, including the use and sale thereof within the Northern District of Iowa, Central Division, gypsum board (including but without limitation gypsum wallboard, gypsum lath, gypsum sheathing, and other similar boards containing a cellular core composed of cementitious material) embodying or made by the use of, the inventions disclosed and claimed in said Letters Patent.

5. Certain-teed, during all periods pertinent to the Complaint, has had full knowledge of Letters Patent No. 2,017,022 and of the fact that all right, title and interest therein and thereto was in U. S. Gypsum, but despite said knowledge, Certain-teed continued and persisted in such infringement, as aforesaid.

6. By reason of the aforesaid infringement, Certain-teed has derived unlawful gains and profits which plaintiff would otherwise have received but for the aforesaid infringement, to the damage of the plaintiff in the sum of Six Hundred Fifty Thousand Dollars ($650,000).

Wherefore, plaintiff, U. S. Gypsum, prays as follows:

(a) If the Court finds that defendant, Certain-teed is indebted to plaintiff, U. S. Gypsum, as alleged in either Counts I, II, III or IV hereof, that judgment be entered against said defendant for the sum of Six

Hundred Fifty Thousand Dollars ($650,000), together with interest and costs of this suit;

(b) Or in the alternative, if the Court finds that defendant, Certain-teed, has infringed U. S. Gypsum's Letters Patent No. 2,017,022, as charged in Count V hereof, that judgment be entered against the defendant for due compensation for making, using, and selling said invention, not less than a reasonable royalty [fol. 972] therefor, in the sum of Six Hundred Fifty Thousand Dollars ($650,000), together with costs of this suit.

Cranston Spray, Robert C. Keck, MacLeisch, Spray, Price & Underwood, 134 South LaSalle Street, Chicago 3, Illinois, Arthur A. Olson, Thiess, Olson, Mecklenburger, vonHolst and Coltman, 77 West Washington Street, Chicago 2, Illinois, Bert B. Burnquist, Burnquist, Helsell & Burnquist, State Bank Building, Fort Dodge, Iowa, *Attorneys for the Plaintiff.*

The agreement of October 15, 1929, between United States Gypsum Company and Certain-Teed Products Corporation, which is attached to *Exhibit D*, is omitted. Said agreement appears in the Transcript of Record Civil Action No. 8017, commencing at page 9413, and in the Transcript of Record in Supreme Court of the United States, October Term, 1947, No. 13, at page 4379.

[fol. 973] EXHIBIT E TO PETITION

THIESS, OLSON & MECKLENBURGER
Attorneys and Counselors
77 West Washington Street
Chicago 2
Financial 6-1200

July 25, 1952

Henry J. Kaiser Company,
1924 Broadway,
Oakland, California.

Gentlemen:

Acting under instructions of our client, United States Gypsum Company, we hereby notify you that the gypsum board which you are marketing, and the processes by which said board is made at the plants of the Kaiser Gypsum Division of your company at Redwood City and Long Beach, California, infringe the following United States patents owned by United States Gypsum Company:

No. 2,017,022—granted Oct. 8, 1935 to C. K. Roos
No. 2,044,401—granted June 16, 1936 to C. K. Roos
No. 2,079,338—granted May 4, 1937 to C. K. Roos
No. 2,080,009—granted May 11, 1937 to C. K. Roos

You are requested to desist forthwith from such infringement and to make prompt settlement for past infringement.

We trust that you will let us hear from you promptly in regard to the foregoing.

Yours very truly, Thiess, Olson & Mecklenburger,
By: Arthur A. Olson.

AAO:amo, Registered Mail, Return Receipt Requested.

[fol. 974] BROWN, JACKSON, BOETTCHER & DIENNER
Attorneys and Counselors
Patent and Trademark Law
1550 Monadnock Block
53 W. Jackson Blvd.
Chicago 4

JAD-JC September 23, 1952

Mr. Arthur A. Olson
Thiess, Olson & Mecklenburger
77 West Washington Street
Chicago 2, Illinois

Dear Mr. Olson:

This will acknowledge yours of September 19th with two enclosed forms of license agreements relating to light weight gypsum board. Thank you for sending the same.

At the recent conference which we had with you, we were surprised by your position that our *in situ* operations infringed your client's patents. That position made it necessary for us to consider re-examination of the question of possible infringement, and we wished, at the same time, to consider such other alternatives as might be open to us.

You will appreciate that the inquiry which we made was not a request for a license, but a request for information.

One of the items which is not clear, from the material which you have forwarded to us, is the matter of accounting for alleged past infringement. We assume that any accounting would begin May 15, 1951, the date of the final decree in the anti-trust suit. Is that correct?

Yours very truly,

— —

[fol. 975] THIESS OLSON & MECKLENBURGER
Chicago 2

September 26, 1952

Mr. John A. Dienner
53 West Jackson Blvd.
Chicago 4, Illinois

Dear Mr. Dienner:

Replying to your letter of September 23, the United States Gypsum Company would expect the Kaiser Company to account for the entire period of its infringement.

While the new gypsum board license agreements entered into pursuant to applications under the final decree of May 15, 1951, have been made effective as of the latter date, in each instance our client has reserved all rights of recovery for any infringement prior to that date.

Our client is willing to grant the Kaiser Company licenses in the forms as submitted to you and effective May 15, 1951, but, as stated above, an accounting for the entire period of the infringement will be expected.

Yours very truly, Thiess Olson & Mecklenburger,
By Arthur A. Olson.

[fol. 976] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PETITION OF CERTAIN-TEED PRODUCTS CORPORATION FOR ENFORCEMENT OF COMPLIANCE WITH FINAL DECREE OF MAY 15, 1951—Filed April 22, 1953

Now Comes *Certain-Teed Products Corporation,* a corporation, defendant, and represents to this Court as follows:

1. Your petitioner (hereinafter referred to as "Certain-teed") is one of the defendants to the above-entitled action. United States Gypsum Company (hereinafter referred to as "USG") is also one of the defendants to the above-entitled action.

2. On May 15, 1951, this Court entered its final decree herein, pursuant to the opinion of the Supreme Court handed down on November 7, 1950, *United States* v. *United States Gypsum Company, et al.,* 340 U. S. 76. In and by [fol. 977] said final decree it was provided, among other things, as follows:

"Article II

"5. 'Patent Licenses' shall mean the patent license agreements which were in effect between defendant

United States Gypsum Company and each of the other defendant companies at the time the complaint herein was filed and described in said complaint as follows:

"Agreement dated October 15, 1929, between United States Gypsum Company, as licensor, and Certain-teed Products Corporation, as licensee;"

"Article IV

"Each of the license agreements listed in Article II hereof is adjudged unlawful under the antitrust laws of the United States and illegal, null and void."

"Article X

"Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this decree, or any other person, firm or corporation that may hereafter become bound thereby in whole or in part, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of this decree, and (2) for the enforcement of compliance therewith."

3. On October 15, 1929, Certain-teed entered into with USG the license agreement hereinabove referred to, in which it was provided, among other things:

(a) Certain-teed agreed to pay to USG an amount equivalent to 1% of its selling price on all plaster board and gypsum wall board of every kind manufactured and sold by it to the date of the expiration of the last expiring patent issued upon certain applications then pending in the United States Patent Office, including application filed by Carlisle K. Ross, which applica- [fol. 978] tion was granted on October 8, 1935, by the issuance of United States Patent 2017022 to USG, as assignee of said Roos application.

(b) Certain-teed agreed not to sell patented wall board to manufacturing distributors unless USG gave its consent as to each purchaser.

(c) USG reserved the right to fix the minimum price at which Certain-teed sold wall board embodying USG's patents.

(d) The right, license and privilege granted by the license was indivisible and non-exclusive.

(e) USG was granted the right at all reasonable times to inspect the books of account and records of Certain-teed, and Certain-teed agreed to keep separate, full and accurate books of acsount and record showing the exact quantity of plaster board and gypsum wall board manufactured or sold by it.

4. On August 15, 1940, the United States of America, as plaintiff in the above entitled action, filed its complaint herein against USG and Certain-teed and others, charging violations of the Sherman Act. The complaint alleged that defendants were engaged in an unlawful combination to fix prices on patented gypsum board and unpatented gypsum products and to eliminate competition in the gypsum board industry and that such combination was effectuated by substantially uniform patent license agreements between USG and the other defendants manufacturing such products, including the license agreement dated October 15, 1929, between USG and Certain-teed.

[fol. 979] 5. On March 8, 1948, the Supreme Court of the United States reversed the judgment of this Court dismissing plaintiff's complaint, 333 U.S. 64, and held *inter alia* as follows:

(a) From 1929, in which year USG licensed all but two companies manufacturing gypsum board in substantially identical terms, USG maintained rigid control over the price and terms of sale of virtually all gypsum board. Since 1937 the control was complete.

(b) Under bulletins issued by USG the gypsum industry accepted directions defining in minute detail both the prices and terms of sale of patented gypsum board.

(c) Regardless of motive, the Sherman Act bars patent exploitation of the kind that was here attempted. The license agreements and the bulletins

establish the conspiracy of the licensor and licensees to violate the Sherman Act.

(d) Patents grant no privilege to their owners of organizing the use of those patents to monopolize an industry through price control, through royalties for the patents drawn from patent-free industry products, and through regulation of distribution. Here patents have been put to such uses as to collide with the Sherman Act's protection of the public from evil consequences.

(e) The licensor was to fix minimum prices binding both on itself and its licensees; the royalty was to be measured by a percentage of the value of all gypsum products, patented or unpatented; the license could [fol. 980] not be transferred without the licensor's consent; the licensee opened its books of accounts to the licensor; the licensee was protected against competition with more favorable licenses and there was a cancellation clause for failure to live up to the arrangements.

(f) The *General Electric* case gives no support for a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized.

(g) By the record now presented, violation of the Sherman Act is clear.

6. After remand of this action to the District Court, plaintiff moved for summary judgment, which this Court entered on November 7, 1949. Plaintiff and defendant USG appealed to the Supreme Court. The appeal of the latter was dismissed by the Supreme Court, 339 U. S. 960. In its order of dismissal, the Supreme Court affirmed Article III of this Court's decree of November 7, 1949, stating:

" 'The defendant companies have acted in concert in restraint of trade and commerce among the several

states in the eastern territory of the United States to fix, maintain, and control the prices of gypsum board and have monopolized trade and commerce in the gypsum board industry in violation of Sections 1 and 2 of the Sherman Antitrust Act,' is affirmed."

The Supreme Court, pending its further order, also enjoined the corporate defendants from

[fol. 981] "(1) enforcing in any manner whatsoever the provisions of their current license agreements fixing, maintaining, or stabilizing prices of gypsum board or the terms and conditions of sale thereof * * *."

7. On plaintiff's appeal, the Supreme Court, 340 U. S. 76, enlarged the provisions of the decree of this Court entered November 7, 1949, and held:

(a) Price fixing licenses made in knowing concert by standardized price requirements violated the Sherman Act by their very existence.

(b) A trial court, upon a finding of a conspiracy in restraint of trade and a monopoly, has the duty to compel action by the conspirators that will, so far as practicable, cure the effects of the illegal conduct and assure the public freedom from its continuance. The conspirators should, so far as practicable, be denied future benefits from forbidden conduct.

(c) The District Court's decree was inadequate to cure the ill effects of the illegal conduct.

8. On May 15, 1951, pursuant to the second opinion of the Supreme Court, this Court modified its prior decree in accordance therewith and entered its final decree containing the provisions hereinabove set forth.

9. Certain-teed paid all royalties due under its license agreement of October 15, 1929, until the Supreme Court's opinion of March 8, 1948, held such license agreement to be unlawful and invalid. Thereafter, and in conformity with and obedient to the decision of the Supreme Court of the United States, Certain-teed paid no royalties to USG under the unlawful license agreement.

[fol. 982] 10. USG did not inform or advise this Court of any claim to the royalties now claimed by it, nor did it seek to recover such unpaid royalties as a condition to granting the new license provided for in the final decree of this Court. Further, USG did not advise or inform this Court that it claimed such royalties or that it had any right thereto, and, in fact, suppressed and concealed from this Court that it intended to assert any such claim. On November 9, 1951, pursuant to the final decree of this Court, Certain-teed entered into a new license agreement with USG, with royalties thereunder payable from and after May 15, 1951, in which USG licensed Certain-teed under Patent No. 2017022. Certain-teed paid the royalties required of it under said new license agreement until the expiration of said patent on October 8, 1952. No reference was made in said new license agreement to any past due royalties, and no claim therefor was made by USG in the negotiation of the new license agreement. Payments of royalties under the new license agreement were accepted by USG without any reservation of rights or claim to said past due royalties.

11. On March 11, 1953, USG filed suit against Certain-teed in the United States District Court for the Northern District of Iowa, Central Division, seeking to recover past due royalties alleged to be due under the unlawful license agreement of October 15, 1929, for the period between April 1, 1948 and May 15, 1951, copy of which complaint is attached hereto and made a part hereof as Exhibit A. In and by Count I of said complaint USG seeks to enforce the unlawful license agreement of October 15, 1929, to require Certain-teed to pay the royalties provided to be paid there-[fol. 983] under for the period between April 1, 1948 and May 15, 1951. In and by the remaining counts of its complaint, Counts II to V, inclusive, USG seeks to recover such royalties by allegations (1) of agreement to pay the same; (2) repudiation of the license agreement by Certain-teed and acquiescence by USG, with agreement to pay for the use of the patent, by reason of which Certain-teed became indebted to USG; (3) use of the patent and promise to pay for such use, and (4) infringement of said patent by Certain-teed. Said allegations of said Counts II to V, inclusive, of USG's complaint, are contrary to the fact and constitute

an attempt on the part of USG to recover for the value of the use of said patent rather than under the unlawful license agreement. In all of the counts of its complaint the amount claimed by USG from Certain-teed is 1% of Certain-teed's selling price of gypsum board manufactured and sold by it during the period in which no royalties were paid.

12. Said Counts II to V, inclusive, of USG's complaint are a subterfuge and an attempt to recover indirectly the royalties agreed to be paid under the unlawful license agreement, which relief USG seeks by Count I of its complaint to recover directly under said unlawful license agreement.

13. In and by said license agreement of October 15, 1929, it is expressly provided that said agreement shall be indivisible. Certain-teed further alleges that the royalty agreement contained therein is not severable from the price fixing and other provisions thereof which the Supreme Court and this Court by its decree have held to be unlawful under the Anti-Trust Laws of the United States, and illegal, null and void.

[fol. 984] 14. The suit filed by USG against Certain-teed in the District Court for the Northern District of Iowa is, in effect, an attempt to obtain the royalties provided to be paid under said unlawful license agreement, or the equivalent of such royalties in damages. The final decree of this Court in adjudicating said unlawful licenses as illegal, null and void, and the opinions of the Supreme Court to the same effect, prevent and bar USG from enforcing in any manner, directly or indirectly, any provision of said unlawful license. USG cannot treat the royalty provision as separate from other provisions of the license agreement and thus attempt to assert the validity thereof in the face of the final decree of this Court declaring such agreement illegal, null and void. The suit filed by USG against Certain-teed, therefore, is an attempt to circumvent and avoid the decree of this Court.

15. As a matter of law, USG misused its patents, including No. 2017022, upon which it seeks to recover royalties from Certain-teed in the suit filed by it in the District Court for the Northern District of Iowa. Such misuse continued until the execution of the new license agreement dated November 9, 1951, entered into pursuant to the final decree

of this Court, effective as of May 15, 1951. The question of USG's right to collect royalties under its misused patents was inherent in the issues before this Court, and USG was under the duty, if it sought or intended to attempt to recover such royalties, to apply for and secure a determination of this Court that it had terminated its misuse and that the evil consequences thereof had been dissipated, so that it might thereafter enforce its right to collect compensation [fol. 985] for such misused patents. USG, having failed to so apply to this Court, is now barred from claiming such compensation for the period prior to May 15, 1951.

16. The use of its patents by USG in violation of the Sherman Act did not terminate, and the effects thereof were not dissipated until, at the earliest, the entry of the final decree on May 15, 1951, by this Court. Any attempt, therefore, by USG to collect royalties for a period prior to the entry of said final decree herein properly can be made only in this Court.

17. The action filed by USG against Certain-teed in the Northern District of Iowa to recover such past due royalties constitutes a violation of the decree of this Court entered May 15, 1951, and an attempt to circumvent it. Said action seeks the enforcement of the unlawful license agreement directly in the first instance and indirectly through claims for use and infringement, despite the fact that this Court in its said decree held the agreement to be illegal, null and void. If USG is allowed to proceed with its said action, it will be enabled to attempt to recover the benefits of its misused patents contrary to the opinions of the Supreme Court entered on March 8, 1948, and November 27, 1950, and the final decree of this Court. Further, said action filed by USG to enforce the unlawful license agreement, constitutes a direct attack on the final decree entered by this Court on May 15, 1951. By its said action against Certain-teed, USG has made manifest that it is still relying on the license agreement which the Supreme Court on two occasions and this Court by its final decree have held to be illegal, null and void.

[fol. 986] Wherefore, Certain-teed prays that this Court enter its order

1. Temporarily and permanently enjoining USG from

further prosecuting the action heretofore filed by it against Certain-teed in the District Court for the Northern District of Iowa, Central Division;

2. Temporarily and permanently enjoining USG from asserting any claim against Certain-teed for payment for the use of said misused Patent No. 2017022, or any other of its misused patents;

3. Temporarily and permanently enjoining USG from instituting or threatening to institute, or maintaining or continuing any action for payment for the use of any misused patent for any period prior to May 15, 1951;

4. That USG be directed to discontinue and dismiss with prejudice to USG its said pending action against Certain-teed;

5. That Certain-teed may have such further and other relief as to this Court may seem proper.

Clausen, Hirsh & Miller, 135 South LaSalle Street, Chicago 3, Illinois, Attorneys for Petitioner, By Herbert W. Hirsh, Norman A. Miller. Purcell & Nelson, 910 17th Street, N. W., Washington, D. C., Of Counsel, By Ganson Purcell.

April 21, 1953.

[fol. 987] *Duly sworn to by Arthur O. Graves. Jurat omitted in printing.*

[fols. 988-998] EXHIBIT A TO PETITION—Omitted. Printed side page 963 ante.

[fol. 999] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PETITION OF NEWARK PLASTER COMPANY FOR ORDERS, MODIFICATIONS, OR DIRECTIONS FOR THE ENFORCEMENT, CONSTRUCTION OF CARRYING OUT OF THE FINAL DECREE HEREIN OF MAY 15, 1951—Filed May 16, 1953

The petition of Newark Plaster Company, respectfully shows:

1. Petitioner, Newark Plaster Company (hereinafter referred to as "Newark"), is a defendant in the above entitled action. United States Gypsum Company (hereinafter referred to as "USG"), is also a defendant in the above entitled action.

[fol. 1000] 2. On May 15, 1951, this Court entered the final decree herein which provided in Article IV thereof that, among others, a certain agreement, dated April 23, 1930, between USG and Kelly Plasterboard Company (hereinafter referred to as "Kelly"), which agreement was later, on or about December 31, 1938, assigned by Kelly to Newark "is adjudged unlawful under the anti-trust laws of the United States and illegal, null and void."

3. Theretofore, on March 8, 1948, the Supreme Court had held that "such an agreement in purpose and effect increased the area of the patent monopoly and is invalid."

4. On or about January 30, 1953, USG commenced an action against Newark in the United States District Court for the District of New Jersey, in which USG seeks to obtain, directly and indirectly, the amount of the benefits provided for in the said void license agreement and for the alleged use by Newark of certain patents, all of which were the subject matter of the said void agreement.

5. Upon information and belief, USG has commenced similar actions against National Gypsum Company, a defendant herein (hereinafter referred to as "National"), in the United States District Court for the Northern District of Iowa, Central Division, against Ebsary Gypsum Company, Inc., a defendant herein, in the United States District Court for the Southern District of New York and against

Certain-Teed Products Corporation, a defendant herein, in the United States District Court for the Northern District of Iowa, Central Division. In the said actions, USG seeks to obtain, directly and indirectly, the amount of the benefits provided for in license agreements between USG and the said several defendants similar to the said license agreement of April 23, 1930 between USG and Kelly, all of which license agreements this Court, in its final decree herein, has declared void, and for the alleged use by the [fol. 1001] said several defendants of certain patents, all of which were the subject matter of the said void license agreements.

6. By the said actions referred to in paragraphs 4 and 5 of this petition, USG seeks to circumvent the decree of this Court.

7. Upon information and belief, during the period for which USG seeks to recover as aforesaid from Newark in the said action against Newark the amount of the benefits provided for in the said void license agreement of April 23, 1930 and for the alleged use by Newark of the said patents, USG misused the said patents in the particulars set forth in paragraph 21 of Claim II of the petition herein of National, dated March 25, 1953, which said particulars are incorporated herein by reference with the same force and effect as if herein fully set forth.

8. By Article X of its decree of May 10, 1951, this Court retained jurisdiction of this cause, as follows:

> "Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this decree, or any other person, firm or corporation that may hereafter become bound thereby in whole or in part, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of this decree, and (2) for the enforcement of compliance therewith."

9. This Court has primary jurisdiction to determine whether or not its decree bars USG from seeking to enforce against Newark, directly or indirectly, the said license agreement which this Court has pronounced void,

or from seeking otherwise to recover, directly or indirectly, [fol. 1002] from Newark the amount of the benefits provided for in the said void license agreement or for the alleged use by Newark of the said patents.

WHEREFORE, petitioner prays:

I. That the Court restrain USG, until this petition is finally determined, from taking any steps in furtherance of any action by it against Newark, or from commencing any new action against Newark in which USG claims, directly or indirectly, the amount of the benefits provided for in the said void license agreement of April 23, 1930, or any amount for the alleged use by Newark of any of the said patents, the subject matter of the said void license agreement.

II. That the Court direct USG to file its answer to the petition of Newark.

III. That the Court, on the basis of the record already made in this Civil Action No. 8017, and on the basis of this petition, other pleadings and all evidence taken pursuant to this petition and the petitions of the other defendants herein, modify its final decree herein by ordering and directing USG to discontinue and dismiss, with prejudice to USG, its pending action against Newark.

IV. That the Court, on the basis of the record already made in this Civil Action No. 8017, and on the basis of this petition, other pleadings and all evidence taken pursuant to this petition and the petitions of the other defendants herein, enjoin USG from asserting, directly or indirectly, any claim against Newark for the amount of the benefits provided for in the said void license agreement or for any amount for the alleged use by Newark of any of the said patents.

[fol. 1003] V. That the petitioner have such further and general relief as may be proper.

May 15, 1953.

De Witt, Pepper & Howell, By: Benjamin P. De Witt,
A member of the firm, Attorneys for Petitioner,
120 Broadway, New York 5, New York.

[fol. 1004] *Duly sworn to by Frderick Tomkins. Jurat omitted in printing.*

[fol. 1005] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

AMENDMENT TO DESIGNATION OF JUDGES—May 6, 1953

The Honorable Joseph R. Jackson having retired as a Judge of the United States Court of Customs and Patent Appeals on April 1, 1952, it is necessary because of pending matters in the above-entitled case to amend the original designation of Judges herein dated September 15, 1942, to hear and determine the above-entitled case so as to provide for the replacement of the Honorable Joseph R. Jackson by a District Judge.

Now, therefore, pursuant to the authority vested in me by Section 28 of Title 15, United States Code, I hereby amend said designation of September 15, 1942, by designating the Honorable William P. Cole, Jr., heretofore designated by the Chief Justice of the United States to serve as a Judge of the United States District Court for the District of Columbia, in the place and stead of the Honorable Joseph R. Jackson to hear and determine the above-entitled case.

Dated: May 6, 1953.

Harold M. Stephens, Chief Judge of the District of Columbia Circuit.

[fol. 1005-A] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PETITION OF EBSARY GYPSUM COMPANY, INC. FOR ORDERS, MODIFICATIONS, OR DIRECTIONS FOR THE ENFORCEMENT, CONSTRUCTION OR CARRYING OUT OF THE FINAL DECREE HEREIN OF MAY 15, 1951—Filed June 6, 1953

The petition of Ebsary Gypsum Company, Inc., respectfully shows:

1. Petitioner, Ebsary Gypsum Company, Inc. (hereinafter referred to as "Ebsary"), is a defendant in the above en-

titled action. United States Gypsum Company (hereinafter referred to as "USG"), is also a defendant in the above entitled action.

2. On May 15, 1951, this Court entered the final decree herein which provided in Article IV thereof that, among [fol. 1005-B] others, a certain agreement, dated October 18, 1929, between USG and Ebsary "is adjudged unlawful under the anti-trust laws of the United States and illegal, null and void".

3. Therefore, on March 8, 1948, the Supreme Court had held that "such an agreement in purpose and effect increased the area of the patent monopoly and is invalid".

4. On or about February 27, 1953, USG commenced an action against Ebsary in the United States District Court for the Southern District of New York, in which USG seeks to obtain, directly and indirectly, the amount of the benefits provided for in the said void license agreement and for the alleged use by Ebsary of certain patents, all of which were the subject matter of the said void agreement.

5. Upon information and belief, USG has commenced similar actions against National Gypsum Company, a defendant herein (hereinafter referred to as "National"), in the United States District Court for the Northern District of Iowa, Central Division against Newark Plaster Company, a defendant herein, in the United States District Court for the District of New Jersey and against Certain-Teed Products Corporation, a defendant herein, in the United States District Court for the Northern District of Iowa, Central Division. In the said actions, USG seeks to obtain, directly and indirectly, the amount of the benefits provided for in license agreements between USG and the said several defendants similar to the said license agreement of October 18, 1929 between USG and Ebsary, all of which license agreements this Court, in its final decree herein, has declared void, and for the alleged use by the said several defendants of certain patents, all of which were the subject matter of the said void license agreements.

6. By the said actions referred to in paragraphs 4 and 5 of this petition, USG seeks to circumvent the decree of this Court.

[fol. 1005C] 7. Upon information and belief, during the period for which USG seeks to recover as aforesaid from Ebsary in the said action against Ebsary the amount of the benefits provided for in the said void license agreement of October 18, 1929, and for the alleged use by Ebsary of the said patents, USG misused the said patents in the particulars set forth in paragraph 21 of Claim II of the petition herein of National, dated March 25, 1953, which said particulars are incorporated herein by reference with the same force and effect as if herein fully set forth.

8. By Article X of its decree of May 10, 1951, this Court retained jurisdiction of this cause, as follows:

> "Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this decree, or any other person, firm or corporation that may hereafter become bound thereby in whole or in part, to apply to this Court at any time for such orders, modifications, vacations or directions as may be necessary or appropriate (1) for the construction or carrying out of this decree, and (2) for the enforcement of compliance therewith."

9. This Court has primary jurisdiction to determine whether or not its decree bars USG from seeking to enforce against Ebsary, directly or indirectly, the said license agreement which this Court has pronounced void, or from seeking otherwise to recover, directly or indirectly, from Ebsary the amount of the benefits provided for in the said void license agreement or for the alleged use by Ebsary of the said patents.

Wherefore, petitioner prays:

I. That the Court restrain USG, until this petition is finally determined, from taking any steps in furtherance of any action by it against Ebsary, or from commencing any new action against Ebsary in which USG claims, directly or indirectly, the amount of the benefits provided for in the said void license agreement of October 18, 1929, or any [fol. 1005D] amount for the alleged use by Ebsary of any of the said patents, the subject matter of the said void license agreement.

II. That the Court direct USG to file its answer to the petition of Ebsary.

III. That the Court, on the basis of the record already made in this Civil Action No. 8017, and on the basis of this petition, other pleadings and all evidence taken pursuant to this petition and the petitions of the other defendants herein, modify its final decree herein by ordering and directing USG to discontinue and dismiss, with prejudice to USG, its pending action against Ebsary.

IV. That the Court, on the basis of the record already made in this Civil Action No. 8017, and on the basis of this petition, other pleadings and all evidence taken pursuant to this petition and the petitions of the other defendants herein, enjoin USG from asserting, directly or indirectly, any claim against Ebsary for the amount of the benefits provided for in the said void license agreement or for any amount for the alleged use by Ebsary of any of the said patents.

V. That the petitioner have such further and general relief as may be proper.

June 3, 1953.

Joseph S. Rippey, Attorney for Petitioner, 612 Powers Building. Rochester 14, New York.

[fol. 1005E] *Duly sworn to by Frank W. Allen. Jurat omitted in printing.*